

14-4455-cv

**United States Court of Appeals
for the
Second Circuit**

ALLIANZ RISK TRANSFER AG,

Plaintiff,

MARATHON STRUCTURED FINANCE FUND, LP, NEWSTAR FINANCIAL, INC.,
MUNICH RE CAPITAL MARKETS NEW YORK, INC.,

Plaintiffs-Appellants,

– v. –

PARAMOUNT PICTURES CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF and SPECIAL APPENDIX
FOR PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants hereby certify that:

1. Marathon Structured Finance Fund, LP does not have a parent corporation and no publicly held corporation owns 10% or more of its membership interest.

2. NewStar Financial, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its membership interest.

3. Munich Re Capital Markets New York, Inc. is wholly owned by Munich Reinsurance Company AG (“Munich Re”) (through Munich American Holding Corporation). More than 10% of Munich Re is owned by the Harvey Investment Trust, the sole beneficiary of which is National Indemnity Company, which in turn is wholly owned by Berkshire Hathaway, Inc.

Dated: New York, New York
March 16, 2015

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JURISDICTIONAL STATEMENT

Plaintiffs-appellants Marathon Structured Finance Fund, LP, NewStar Financial, Inc., and Munich Re Capital Markets New York, Inc. (collectively, “Appellants”), by their attorneys, Pryor Cashman LLP, appeal from a Decision and Judgment (the “Decision”) by the United States District Court for the Southern District of New York (Hon. Katherine B. Forrest), entered on October 31, 2014, in favor of Defendant-appellee Paramount Pictures Corporation (“Paramount”) on all claims. Subject matter jurisdiction in the trial court was proper under 28 U.S.C. §§ 1331 and 1367(a). Appellants timely filed a Notice of Appeal of the Judgment on December 1, 2014. This is an appeal from a final judgment under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Did the trial court’s clear misapprehension of the evidence concerning risk mitigation techniques employed by Paramount in a film financing investment cause the trial court to make a series of erroneous findings about each of the elements of Appellants’ federal securities fraud, common law fraud, and unjust enrichment claims?

2. Did the trial court err in applying its own, unsupported understanding of contract terms in lieu of applying traditional contract interpretation principles to find that Appellants’ claims were barred by a contractual waiver and disclaimers?

STATEMENT OF THE CASE

This is a case involving the area of film finance of major motion pictures, a subject which is not common knowledge. It concerns various techniques of film financing and risk mitigation.

This action had proceeded for over six years before Judge Thomas Griesa. Judge Griesa denied many lengthy dispositive motions made by Paramount on the pleadings and on the merits. Judge Katherine Forrest inherited the action (without explanation) on October 20, 2014 at approximately, 11 a.m., and proceeded with the trial at 9 a.m. the following morning.

Judge Forrest dismissed the case pursuant to Fed. R. Civ. P. 52(c) after a two-week trial. Judge Forrest found in her 62-page decision, delivered five minutes after the close of Rule 52(c) oral arguments, that Appellants' claims did not "make a lot of sense" to her "from a business perspective." (SPA-2-18.)

The record shows that Judge Forrest's intuition and finding as to the "business sense" of Appellants' claims was unsupported by evidence and, indeed, contradicted by the only evidence on point. Moreover, a reading of Judge Forrest's decision shows that as a result of her mistaken understanding of the business circumstances of the claims, she failed to conduct the proper factual and legal analyses.

Judge Forrest decided at the outset that Appellants' essential allegation that Paramount had secretly changed an important business strategy, thereby materially increasing the risk of Appellants' investments, did not "make a lot of sense" to her. (*Id.*) Judge Forrest then reasoned backwards to find that Paramount did not defraud Appellants or engage in unconscionable behavior. Judge Forrest also substituted her own understanding of essential contractual terms to find the existence of a "waiver" and "disclaimers" that she found barred Appellants' claims, without analyzing those terms according to controlling contract law principles and the evidence.

The essence of Appellants' claims is that Paramount represented to Appellants that it would continue to conduct its business with respect to the financing of motion pictures as it had done in the past. The trial court correctly identified the issue as follows:

... plaintiffs sought assurances that business would continue as usual.

(SPA-8, Tr.1617:15-16.)

What Appellants understood to be the continuation of "business as usual" was the use by Paramount of a risk mitigation technique known as "territorial sales" of film distribution rights, which was a signature risk mitigation technique of Paramount's. Pursuant to this well-known technique, Paramount would limit the

performance risk of poorly performing films by licensing certain films in territories outside of the United States for a non-refundable payment. As a result, if the film performed poorly, the foreign distributor would suffer the loss associated with the cost of acquiring the rights and distributing the film but Paramount would eliminate that risk as a result of the receipt of the non-refundable payment.

Appellants demonstrated that in the five-year period prior to their investment, as reflected in data provided to investors by Paramount in a “Historical Data Set” (“HDS”), Paramount had territorially sold 24.1% of the aggregate production cost of its films.¹ Appellants also demonstrated that only 3.2% of the aggregate production cost of films in Appellants’ investment slate (the “Melrose Slate”) had been offset by territorial sales: *a drop of over 85%*. (A-800-01.)

The trial court’s Decision is hinged on the finding that this decline in territorial selling reflected “no fundamental change in business strategy that would rise to the level of not business as usual.” (SPA-8, Tr.1617:21-23.) To reach this finding, the trial court erroneously compared only anecdotally the quantum of territorial sales in certain years of the HDS to certain other years covered by the Melrose Slate. Such an analysis, failing to take into account the experience of the entire 25-film Melrose Slate, could not (and did not) yield a meaningful result.

¹ The HDS was provided by Paramount to investors to evaluate the investment.

Moreover, to the extent that the trial court attempted to compare the HDS to the Melrose Slate with respect to territorial sales, it relied on the wrong data.

Paramount, in an attempt to obscure the analysis of territorial sales, divided transactions with the same economic effect into two separate categories, thereby hoping to minimize the appearance of the decline in territorial sales. Specifically, Paramount, in its demonstrative exhibits, divided the relevant transactions into the categories of “territorial sales” and “split rights” deals. (A-802-09.) However, the testimony of Paramount’s own witness at trial, Karen Magid, Esq., established that the economic effect of the transactions denominated as “territorial sales” or “split rights” deals is identical. Consequently, the trial court entered a stipulation which provided that in analyzing the level of “territorial sales,” three categories would be added together: foreign pre-sales, split rights deals, and domestic acquisitions.

When the trial court engaged in its own anecdotal review of “territorial sales,” however, it failed to take account of the equivalence of foreign pre-sales and split rights deals (in particular) and, therefore, based its findings on data that did not accurately reflect the level of territorial sales. (A-649-50, Tr.1421:17-1422:3.) As a result, the trial court erroneously found the levels of territorial sales in the Melrose Slate to be not materially different from the territorial sales levels in the HDS. That mistake infects the Decision throughout.

Appellants further demonstrated that Paramount – knowing that the Melrose transaction would protect it from downside risk, while *also* allowing Paramount to retain a greater share of profits from films performing well internationally – decided to abandon its territorial sales strategy in favor of the Melrose transaction *prior* to issuance of the private placement memorandum (“PPM”).

Paramount elected not to inform Appellants of this important change in co-financing strategy, and to affirmatively misrepresent and mislead Appellants into believing that territorial sales would continue “in much the same manner as we always have.” (A-2088.)

The Decision shows that the trial court could not have decided the issue presented correctly (did Paramount continue its territorial sales strategy “as usual”) because the court misunderstood the facts and economics of Appellants’ investment in the Melrose Slate. The trial court’s judgment for Paramount under Rule 52(c) should be reversed.

PROCEDURAL POSTURE

Appellants commenced this action on or about December 2, 2008. (A-5.)

Following a nearly two-week trial that commenced on October 21, 2014 (which included live testimony by 8 witnesses, 15 designated depositions, and 257 exhibits), and several hours of oral argument on October 30, 2014 further to Paramount’s motion for judgment on partial findings under Rule 52(c), Judge

Forrest read from the bench a 62-transcript-page, 90-minute ruling granting Paramount's motion and awarding Paramount judgment on all of Appellants' claims. (SPA-2-18, Tr.1592:16-1654:20.) Judge Forrest ruled in Paramount's favor on every issue, save for a question raised by Paramount about the significance of *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), which Judge Griesa had previously twice rejected and which Judge Forrest declined to disturb. (SPA-6, 1609:17-18.)

STATEMENT OF FACTS

A. The Risk Mitigation Technique Known As "Territorial Sales"

Paramount is what is known as a "major" film studio that makes "big budget" motion pictures for both domestic and international release. (A-160, Tr.133:12-18, 134:5-6; A-162, Tr.144:21-25; A-171, Tr.180:5-17.)

Prior to 2004, Paramount had been well known for being a financially conservative and risk-averse studio. (A-370-71, Tr.701:22-702:14; A-1847; A-3275; A-3300; A-3308.) Paramount was particularly known for its territorial sales of film rights. (A-975, Tr.119:11-21; A-164, Tr.150:20-151:17.) As Paramount's then-Chairman, Sherry Lansing, recognized, territorial sales were an important part of Paramount's philosophy of making an "arrangement to protect the downside risk on every film." (A-1038; Tr.42:4-18; A-1053, Tr.104:3-4; A-3312-13.) Paramount's head of the Motion Picture Legal Department testified that territorial

sales *eliminate* upside and downside risk in a particular territory. (A-641, Tr.1386:14-21.)

The Melrose Slate was a poorly performing slate of films. (A-3953-54.) Appellants' damages expert demonstrated that Paramount's abandonment of territorial sales caused Appellants to suffer substantial and measurable losses. (A-3815.)²

The evidence at trial was uncontroverted that, between 1998 and 2003, Paramount used territorial sales to offset 24.1% of its aggregate film production cost. (A-2587-94; A-3850-52; A-1890-1955.) As explained below, in attracting investors for Melrose, Paramount promoted its co-financing practices during this period of time as illustrative of its co-financing strategy for Melrose. This is the essence of Appellants' fraud claims.

Between 1998 and 2003, Paramount entered into territorial sales where third parties, including Lakeshore Entertainment ("Lakeshore"), Mutual Entertainment, and others, obtained the foreign rights to films released domestically by Paramount. (A-1890-1955; A-4193-4205.)

During this period of time, Paramount also employed risk mitigation and co-financing techniques that did not involve sales of foreign rights for non-refundable advances. For example, Paramount took advantage of tax incentive programs in

² Appellants' damages expert did not testify because the trial was bifurcated but his report was accepted into evidence on the issue of loss causation. (A-691, Tr.1444:5-25.)

the United Kingdom and Germany. (A-2587-94; A-3950-52; A-1890-1955.) Paramount also engaged in what are known as “shared pot” deals, in which Paramount co-financed films with other studios, with one studio distributing a film domestically and the other distributing internationally. (*Id.*) Such arrangements required both studios to share the total, worldwide potential upside and downside risk on a 50/50 basis. (A-640-41, Tr.1385:15-1386:18.)

With respect to deals involving risk mitigation through the sales of foreign rights, Paramount’s witness at trial testified that this risk mitigation technique was called by different names: sometimes these deals were known as “territorial sales” and sometimes they were known as “split rights” deals. (A-631, Tr.1347:5-12; A-165, Tr.153:1-20.) Regardless of the nomenclature, Paramount’s witness testified that the economic effect of territorial sales and split rights deals was the same. (A-641, Tr.1387:14-18; A-632, Tr.1351:4-7; A-641, Tr.1388:3-8.) Paramount’s witness additionally testified that with respect to deals where Paramount acquired only domestic distribution rights to films produced by other studios (known as “domestic acquisitions”), the risk mitigation effect was also the same. (A-642, Tr.1390:18-1391:2; A-632, Tr.:1351:4-7.)

It was stipulated between the parties at trial that “territorial sales” include “foreign pre-sales,” “split rights” deals, and “domestic acquisitions” because they all have the same economic effect. (A-649-50, Tr.1421:17-1422:3.) All three

mitigate foreign performance risk to zero. (A-641, Tr.1387:14-18, Tr.1388:3-8; A-632, Tr.1351:4-7; A-642, Tr.1390:18-1391:2.) In contrast, in a “shared pot deal,” each studio continues to bear the entire risk of loss with respect to films that perform poorly internationally. (A-243, Tr.326:17-327:8.) It is undisputed that territorial sales and shared pot deals are not fungible (contrary to the trial court’s misapprehension, as discussed more below). (A-641, Tr.1386:4-1388:8; A-164, Tr.152:6-25.)

**B. Paramount’s Creation Of Melrose
And Abandonment Of Territorial Sales**

In or about late-2002, Paramount conceived the Melrose transaction, through which it would offer both equity and debt investments in a “slate” of motion pictures to be produced and released by Paramount beginning in 2004. (A-1172, Tr.58:2-59:23; A-360-61, Tr.661:17-662:12; A-2451-52; A-3270-74; A-3281; A-4239-4329.) As structured by Paramount and its placement agent, Merrill Lynch, the total number of films that would be included in the “Melrose Slate” would be determined by the size of the total investment pool and the production cost of the films. When the investment dollars to finance the production of films ran out, the slate would be complete. (A-427, Tr.801:15-20.) The Melrose Slate ultimately comprised 25 films. (A-3810-11.)

The evidence showed that, coincident with Paramount’s creation of Melrose, Paramount had also privately decided to make bigger budget movies and to try to

retain more of the potential “upside” from those films by reducing territorial sales. Should that gamble fail (*i.e.*, should the Melrose Slate “flop”), then Paramount and the Melrose investors would all lose money, but *Paramount* would mitigate its own risk of loss by the amount of the Melrose investors’ loss. (*See* A-151, Tr.98:25-99:10; A-412, Tr.740:17-741:9; A-177, Tr.201:10-202:17; A-641, Tr.1386:13-21; A-1308, Tr.90:20-91:21.) This was revealed most directly in three pieces of evidence.

First, in or about mid-2003, Paramount negotiated a new agreement with Lakeshore (one of Paramount’s primary counterparties in territorial sales). (A-1624-25.) Paramount’s new agreement with Lakeshore – which it did not reveal to Appellants – made clear that, unlike its prior agreement, Paramount would “be retaining worldwide distribution rights (with the exception of three territories) as compared with our retention of only domestic distribution rights under the current Lakeshore arrangement.” (A-1624.)

Second, on or about March 10, 2004, during a board meeting of Viacom, Inc. (the parent company of Paramount), Paramount’s senior executives gave a PowerPoint presentation making clear that the “Impact of Financing” from the

Melrose transaction would be for Paramount to “Retain More Foreign Rights” than Paramount had historically done. (A-2002-04; A-3915.)³

Paramount’s witnesses who were involved in preparing the PowerPoint or who attended its presentation uniformly claimed that s/he could not recall what the words “Retain More Foreign Rights” meant. (A-1091-92, Tr.63:7-67:10; A-1050, Tr.92:17-93:14; A-881-82, Tr.108:13-109:13; A-1074, Tr.79:2-80:15; A-1008, Tr.75:12-16.) As with the Paramount executives who could not remember their efforts to pre-sell films, the trial court accepted Paramount’s witnesses’ professed ignorance and found that “there is no one who makes the retain more foreign rights PowerPoint into a smoking gun or to indicate that it reveals a fraud.” (SPA-12, Tr.1632:5-14.)

The trial court’s comments about the PowerPoint presentation overlook the importance of “foreign rights” in risk mitigation. The *only* form of risk mitigation at issue in this case is the sale of foreign territorial rights. The decision to “retain,”

³ The PowerPoint set out a number of bullet points under the heading “Features Strategy” as follows:

- Remain Careful On Costs
 - Big Budget Films
- Continue Financing
- Impact of Financing
 - Merrill Lynch
- Retain More Foreign Rights
- Increase The Number Of Our Releases To Approximately 16 To 18 Per Year
- Remain Focused On Profitability Not Market Share
- Change Our Mix Of Films

(A-3915.)

as opposed to sell, reflects a strategic decision by Paramount and belies the unsupported narrative that Paramount continued its “business as usual.” On the other hand, the decision to “retain more foreign rights” is consistent with, and explains, the decline in territorial sales, which the trial court failed to perceive in its factual analysis.

Third, one month after Paramount’s PowerPoint presentation to the Viacom board, in or about April 2004, Paramount’s chief financial officer, Mark Badagliacca, projected Paramount’s 2004 profit for the films in the Melrose Slate to be \$4.98 million without the Melrose deal, and \$37.53 million with the Melrose deal. (A-2125-32.) The same analysis showed that the Melrose investors were projected to lose \$32.55 million in 2004, exactly the benefit that Paramount received from the investment. (*Id.*) The Melrose deal, in other words, was a zero-sum game for Paramount (although Badagliacca claimed that, even though his office routinely performs such analyses, he could not recall or understand what he meant by his calculations and reporting). (A-870-71, Tr.64:11-67:12.) Paramount did not share this analysis with Appellants, either. The Decision does not address this evidence.

Further proving that Paramount had decided by early 2004 to cease its historical territorial sales practices, the evidence showed that Paramount territorially sold only four films in the Melrose Slate, in deals that closed well prior

to the issuance of the PPM in July 2004: *Suspect Zero* (closed June 5, 2002); *Sky Captain* (closed June 19, 2003); *The Weather Man* (closed November 22, 2003); and *Aeon Flux* (closed May 13, 2004). (A-2630-2703; A-1690-98, A-1586-95, A-1626-36.)⁴

Furthermore, Paramount could not produce a single document attesting to any efforts to territorially sell any other films in the Melrose Slate. (A-645, Tr.1403:12-17.) The only evidence that Paramount offered was conclusory and wholly non-specific testimony by Paramount's executives that they believe efforts to territorially sell other films in the Melrose Slate were made but were simply unsuccessful, which the trial court accepted (stating: "I have no information that is not true. The fact that nothing happened does not mean that nothing was tried."). (SPA-9, Tr.1618:16-1619:9; SPA-12, Tr.1630:2-12; SPA-13, Tr.1634:4-9.)

Nevertheless, none of Paramount's witnesses could explain or purport to recall why Paramount, a highly effective territorial seller of major motion pictures between 1998 and 2003, could not find a single territorial sale to close after Paramount issued the Melrose PPM in July 2004. (A-1096-97, Tr.83:6-88:12; A-127175, Tr.96:14-109:10; A-1275-83, Tr.112:24-142:11; A-1005-06, Tr.64:19-67:20; A-1052, Tr.101:9-102:18.) It is clear that territorial sale opportunities for

⁴ Paramount contended that *Mission: Impossible III* ("Mi3") was pre-sold internationally in May 2006, after the PPM; however, the evidence revealed that Paramount actually only sold the exclusive Japanese advertising rights for *Mi3* to an ad agency in Japan for payment of a recoupable advance, and that the ad agency acquired no rights with respect to the film at all. (A-3729-61.) That was not a territorial sale of the film.

the major motion pictures in the Melrose Slate abounded notwithstanding Paramount's sudden inability to find them. (A-163, Tr.148:13-18; A-1052, Tr.101:9-102:18; A-996-97, Tr.26:20-29:12.) The evidence reflects an 85% drop in territorial sales of films released by Paramount between 1998 and 2003, and films in the Melrose Slate released between 2004 and 2006. (A-2587-93; A-3950-52; A-1889-1999; A-4212-18; A-3762-3809; A-3810-11.)

C. The Trial Court Erroneously Found That Paramount's Territorial Sales Strategy Remained Unchanged After 2003

The trial court found that "[t]here was no fundamental change in business strategy [at Paramount] that would rise to the level of not business as usual." (SPA-8, Tr.1617:21-23.) This finding is clearly erroneous and based on the trial court conflating other movie-making activities with territorial sales.

In supporting its finding, the trial court explained:

[T]here are many forms of risk mitigation, as I've said, and they're highly variable. It is true that Paramount did opportunistically enter into territorial sales, and it did so with respect to the Melrose Slate.... Making a good film, for instance, with solid stars who are known to the box office to be a good draw is a form of risk mitigation.... [P]laintiffs sought assurances that business would continue as usual. And so it seems by the evidence, and the Court so finds, that it did. Paramount continued to make and market movies. It did so according to its best business judgment at the time. That's the evidence in the record. That's what they committed to do. That's what they did.... To the extent that plaintiffs are alleging and have asserted that Paramount failed to engage in any reasonable risk mitigation as they had in the past, that's also disproven by the record. Indeed, the Melrose LLC ... was itself a form of risk mitigation.

(SPA-8-9, Tr.1615:23-1619:9.)

The trial court's opinions about risk mitigation generally find no support in the record. Its opinion that making a "good film" with "solid stars" is risk mitigation confuses the basic activity of making films with an attempt to mitigate the risk of that activity. It embodies the simple advice, applicable to all forms of human activity, to do things carefully and well.

To support the finding that Paramount continued its "business as usual," the trial court observed that Paramount continued to make and market movies and did so according to its best judgment at the time. This observation misses the mark. It focuses only on Paramount's continuation in the movie business but does not address the one issue in the case – risk mitigation through territorial presales.

The trial court's comment that there are many forms of risk mitigation and "they're highly variable," highlights the court's failure to analyze the types and quantum of risk mitigation employed by Paramount. This failure is striking in the trial court's opinion that there is a lack of falsity in Paramount's representations and that Paramount conducted its "business as usual."

At trial, both Appellants and Paramount employed demonstrative exhibits ("Court Exhibits") based upon admitted evidence showing the amount of risk mitigation according to various techniques. (A-800-09.) Both Appellants and

Paramount compared risk mitigation as reflected by the HDS to risk mitigation in the Melrose Slate. (*Id.*)

Paramount's demonstratives ("Court Exhibits 4-11") separately identified certain "territorial sales" and other "split rights" deals to make the number of "territorial sales" in the HDS appear lower – and thus closer to the meager level of territorial sales in the Melrose Slate despite the fact that Paramount's own internal documents make no such distinction. (*Id.*; A-2587-93.) Pursuant to the stipulation between the parties it was agreed that split rights deals, foreign pre-sales, and domestic acquisition deals were *all* "territorial sales." (A-649-50, Tr.1421:17-1422:3.) Thus, Paramount's Court Exhibits 4-11 were all misleading and belied by the parties' stipulation.

Nevertheless, the trial court relied on Court Exhibits 4-11 in making the following critical findings (which underpin the Decision):

Those documents together show a high degree of variability of type and amount of the various kinds of co-financing. They show no territorial sales in 1998, only a few in 1999, 2000 has no shared pot, a few territorial. The Melrose slate 2004 is ahead or at least not particularly different from 1998. 2006 does in fact have some foreign presales for the Melrose slate.

(A-736, 1622:15-21.)⁵

⁵ The trial court relied on Court Exhibits 4-11 and the admitted exhibits underlying those Court Exhibits without observing that the Court Exhibits failed to reflect the parties' stipulation. (A-736, 1622:15-21.)

The trial court's first finding of fact, that the evidence (based on the misleading Court Exhibits 4-11) shows "no territorial sales in 1998," is incorrect. Appellants' contrary demonstrative, "Court Exhibit 3," which *does* adhere to the parties' stipulation, shows territorial sales of 7.75% of gross production cost of all of the films in 1998. (A-800-09.)⁶

The trial court's next finding of fact, that there were "only a few [territorial sales] in 1999" based upon the misrepresentative Court Exhibits 4-11, is likewise incorrect. Appellants' Court Exhibit 3 accurately shows territorial sales of 16.81% of the gross production cost of all of the films released in 1999 (an increase of over 100% from 1998). (A-800-09.)

The trial court's next finding, that 2000 had "no shared pot" and only "a few territorial" sales, is both inapt and incorrect. It is uncontroverted that shared pot deals are qualitatively different from territorial sales and thus irrelevant to this case. (A-243, Tr.326:17-327:8; A-641, Tr.1386:4-1388:8; A-164, Tr.152:6-25.) Moreover, Court Exhibit 3 shows territorial sales of 34.69% of the gross production cost of all of the films released in 2000 (another 100% increase from the prior year). (A-800-01.)

⁶ Consistent with Paramount's own internal treatment of territorial sales on its books, Court Exhibit 3 treats the value of territorial sales for both the HDS and the Melrose Slate as percentages of the films' gross production cost. (A-2587-93; A-3950-52; A-4212-18; A-1889-1999.) In contrast with its own internal treatment, Paramount's Court Exhibits 4-11 treat the value of territorial sales merely as raw numbers and without linking them to production cost (which does not reflect their economic impact). (A-802-09.)

The trial court's findings then ignore years 2001-2003 (the remainder of the HDS), and thus ignore the fact that territorial sales remained at robust levels in each of those years (36.69% of the gross production cost of all of the films released in 2001; 21.73% in 2002; and 30.23% in 2003). (*Id.*) As Court Exhibit 3 accurately shows, territorial sales averaged 24.1% of the gross production cost of all of the films in the HDS. (*Id.*)

The trial court's analysis of the Melrose Slate is similarly flawed. The trial court did not analyze the Melrose Slate in total but merely observed anecdotally – and incorrectly – that in 2004 the Melrose Slate was “ahead or at least not particularly different from 1998.” In fact, as Court Exhibit 3 shows, territorial sales totaled 4.6% in 2004, compared to 7.75% in 1998. (*Id.*)

The trial court's further anecdotal observation that “2006 does in fact have some foreign presales” (1.1% according to Court Exhibit 3), does not support the trial court's ultimate conclusion that Paramount's territorial sales practices for the Melrose Slate reflected “business as usual.”

To buttress its finding that Paramount's risk-mitigation strategy had remained “unchanged,” the trial court additionally relied upon its own, unsupported and mistaken business intuition that it “doesn't make a lot of sense” that Paramount would have changed its territorial sales strategy without telling investors.

The Decision states:

From a business perspective, I would note this doesn't make a lot of sense. If Paramount had bound itself to foreign presales, that does seem to fly in the face of good negotiating strategy, because everybody in the world would then know that you had given up your negotiating leverage and that they would have to obtain a certain number of foreign presales in certain territories because they would be so bound. So to bind oneself to taking that kind of strategic action doesn't make a lot of sense. Binding Paramount to have to achieve a business arrangement with third parties would have handed them certain leverage and changed dynamics, but the alleged coverup also doesn't make a lot of sense. It doesn't make a lot of sense to hide only one small relatively small piece, although a somewhat big dollar amount, depending on how you count it, in a litany of other pieces.

(SPA-4, Tr.1600:22-1601:11.)

There is no support for the trial court's beliefs about "negotiating leverage" and "business dynamics" with respect to territorial sales of major motion pictures. To the contrary: the record is undisputed that film studios can and have successfully based business plans around territorially selling 100% of a studio's films. (A-996-97, Tr.26:20-29:12; A-160, Tr.133:12-23.)⁷ Indeed, it is uncontroverted that between 1998-2003, Paramount itself territorially sold its films in large percentages without encountering a "negotiating leverage" problem.

⁷ Robert Friedman, Paramount's head of distribution at the time of the Melrose transaction, left Paramount to begin a new studio which would distribute its films outside the U.S. based upon this 100% territorial sales strategy. (A-996-97, Tr.26:20-29:12; A-160, Tr.133:12-23.) That studio is now known as Lionsgate, where Mr. Friedman is the head of distribution employing the territorial sales model in releasing such blockbusters as *The Hunger Games*. (A-998, Tr.33:22-34:10.)

The trial court ignored this evidence in favor of its own, general business intuition, and thereupon credited the unsupported testimony of Paramount's witnesses that Paramount's territorial sales strategy and practices had remained unchanged between the HDS and the Melrose Slate because, to the trial court, "it doesn't make sense" that Paramount would have wanted to change those practices. (SPA-4, Tr.1600:22-1601:11.)

D. Paramount's Efforts To Keep Its Abandonment Of Territorial Sales A Secret And To Mislead Investors Into Thinking That Its Strategy Of Territorial Sales Remained Unchanged

The March 2004 Viacom board meeting became the subject of a March 18, 2004 *Wall Street Journal* article, entitled: "Paramount's New Mantra: Taking Risks Is Healthy." (A-2084-85.) The references in this article to Paramount taking on more risk, contrary to its historically risk-averse practices, prompted the head of Merrill Lynch's deal team for Melrose, Peter Hoffman, to urgently seek assurance from Paramount that it was *not* changing its co-financing and risk mitigation strategies. (A-2090-91; A-417, Tr.760:22-761:19.)

Tom McGrath, a senior Viacom executive, whose office was responsible for the Melrose transaction and who helped prepare the PowerPoint presentation, responded in writing to Hoffman's inquiry as follows (expecting that Hoffman would relay this same message to Melrose's potential investors):

While not pretending to understand why stories get written or why a writer may choose to make a specific point of view, *I do not think it*

would be fair to conclude from that story or otherwise that there is any fundamental shift in Paramount's production strategy as it relates to risk management and deal making. The article purports to reference a board meeting held last week that the writer did not attend. I was not present, but I was intimately involved in preparing the materials for that meeting and they do not suggest fundamental changes in strategy. To the contrary, the materials specifically make the following points, which I have carefully redacted from the complete PowerPoint: "Remain Careful on Costs ... Continue Financing ... Retain More Foreign Rights ... Remain Focused on Profitability, Not Market Share."

(A-2088 (emphases supplied).) Conspicuously absent from McGrath's response was the language from the PowerPoint about the "Impact of Financing" to Paramount from the Melrose transaction, which is the language immediately preceding Paramount's next point that it would "Retain More Foreign Rights." (A-2088; A-3915.)

McGrath's written response to Hoffman continued:

Going forward, Paramount's intention is to maintain a balanced slate of films with an overall goal of not increasing our net investment much beyond the historical levels, adjusted for underlying industry growth. The intention is to continue to enter into split rights, co-financing, straight equity deals, territorial sales and tax driven deals in much the same manner as we always have.

(A-2088 (emphases supplied).)

Thus, in order to lull potential investors, McGrath deliberately misrepresented Paramount's intentions regarding its co-financing and risk mitigation strategy with respect to territorial sales. The trial court acknowledged this written communication from McGrath in evaluating the element of scienter,

but nonetheless found it “so vague and general” and “certainly insufficient standing alone to establish an intent to defraud.” (SPA-15, Tr.1642:11-20.) Once again, the trial court was reasoning backwards from its finding that nothing had changed with respect to territorial sales: *i.e.*, if there was no change, there could be no scienter.

In finding that Paramount had not materially omitted any information about its decision to strategically change its territorial sales practices, the trial court also found that Paramount “had publicly came [sic.] out in favor of additional risk” in the *Wall Street Journal* article. (SPA-13, Tr.1634:4-9.) This finding is problematic and clearly erroneous for two reasons: first, *immediately* before making this finding, the trial court inconsistently found that “there was no change of business strategy in 2004” by Paramount with respect to its territorial sales and co-financing practices (*id.*); and second, the trial court’s finding was directly at odds with McGrath’s statement that the *Wall Street Journal* article should *not* be read by investors even to “suggest” that Paramount intended to adopt additional risk-taking in its co-financing and territorial sales strategies. (A-2089.)

The evidence at trial further showed that McGrath’s effort to mislead Hoffman at Merrill Lynch – so that Hoffman would deliver that same misleading message to potential Melrose investors – worked. On or about May 12, 2004, in response to a request from the Moody’s ratings agency (which was evaluating the

Melrose notes) for additional information about co-financing, Hoffman copied Moody's *in haec verba* from the e-mail sent to him by McGrath, in which McGrath also stated (with respect to its co-financing plans) that "we are not done making deals yet and these figures will change." (A-2453; A-2088.)

On or about May 13, 2004, Moody's requested more information on the composition of the co-financing in the HDS, and on that date Paramount provided Moody's with such a breakdown. (A-2459-65; A-2587-93.) Moody's explained that it wanted this information to be able to determine "whether the data we have [*i.e.*, the HDS information] properly reflects the risk/reward structure for the future movies" (*i.e.*, the Melrose Slate). (A-2466.) Moody's additionally asked to see how closely the projected Melrose Slate resembled the risk profile of the HDS. (*Id.*) In response, Hoffman consulted with Paramount and then replied to Moody's:

Forward slate info contains info on those films that will be co-produced with other studios. *I would look at historical data to determine what amounts have been co-financed by other means historically and project that amount going forward.* For conservatism, you could assume slightly lower amounts since the German \$ and other structured deals are generally entered into on an opportunistic basis.

(A-2594.)

It is undisputed that the first sentence of Hoffman's message refers to co-productions with other studios, *i.e.*, shared pot deals. It is also undisputed that the term "forward slate info" refers to certain status reports known as "Release Slate

Elements,” created prior to Appellants’ investments and appearing to show that territorial sale levels of the Melrose Slate at the time were running below HDS levels. (A-2594; A-3687-91.)

In other words, Hoffman was saying in the first sentence (based upon information from Paramount) that the Release Slate Elements reports are reliable with respect to shared pot deals. The second sentence of Hoffman’s message, however, refers to “co-financ[ing] by other means,” including territorial sales. Hoffman was saying in the second sentence (based upon information from Paramount) that the Release Slate Elements reports do *not* accurately reflect territorial sales, and that such co-financing should be projected by Moody’s instead as being in line with HDS levels: *i.e.*, about 24.1% of the gross production costs of the films in the Melrose Slate. (The Release Slate Elements reports are discussed further on pages 32-33, *infra*.)

E. The Melrose PPM Is Materially False And Misleading

Paramount issued the Melrose PPM on or about July 22, 2004. (A-3265.) The PPM includes at least four material misstatements and omissions of fact regarding Paramount’s territorial sales strategy for the Melrose Slate.

First, the PPM states:

Paramount aims to achieve consistent slate profitability by managing capital commitments for each film project, opportunistically entering into output agreements and territory sales with third parties and emphasizing cost mitigation programs.

(A-3300.)

The trial court found this statement to be non-actionable because “[t]here is nothing specific beyond it being opportunistic. There is no guarantee that certain things are going to happen. They’re going to happen more than on a sporadic basis or even at all. ‘Opportunistic’ means an opportunity definitionally has to arise which one takes advantage of. And also the fact of foreign presales is only one among several different potentials.” (SPA-7, Tr.1611:14-23.)

The trial court never would have found this statement to be false or misleading because, as discussed above, the trial court found no change in the level of territorial sales and accepted the conclusory testimony of Paramount’s witnesses that Paramount did at least try to enter into territorial sales of films in the Melrose Slate. The trial court accepted that it was simply bad luck that Paramount was unable to enter into a single territorial sale after the PPM was issued.

Nevertheless, it was uncontroverted that Paramount could not produce a single document evidencing even one attempt by Paramount to territorially sell any films in the Melrose Slate after the PPM was issued. This absence of documentation is striking when compared with the documentation that *did* exist of Paramount’s decision by March 2004 to abandon territorial sales in the Melrose Slate. (A-645, Tr.1403:12-17; A-1624-25; A-985, Tr.159:15-160:13, 160:21-161:24; A-3915.)

Had the trial court not ignored the documentation, then this statement in the PPM would have to be viewed as false and misleading because under no interpretation could Paramount be understood to have “opportunistically” tried or “aim[ed]” to territorially sell anything. Moreover, Paramount gave no indication in the PPM of its true intention to discontinue territorial sales of films in the Melrose Slate.

Second, the PPM states:

There can be no assurance that Paramount will implement the same co-financing techniques as it has in the past.

(A-3300.) The trial court found that this statement “clearly states there is no assurance to implement those same techniques.” (SPA-7, Tr.1611:24-1612:7.)

This statement is another example of Paramount trying to throw investors off-track: by indicating that, regardless of its intentions, unknown factors *could* render Paramount unable to implement certain techniques; when, in fact, Paramount had already decided *with certainty* not to implement territorial sales of the Melrose Slate as Paramount had done with films in the past. (A-3915; A-1624-25.)

Paramount easily could have warned investors in the PPM that Paramount would not employ certain co-financing techniques for the Melrose Slate as Paramount had done in the past – and, in fact, had already decided not to do so –

but Paramount chose instead to say there “can be no assurance” about what the future may hold. Paramount had a duty to be more forthright.

Indeed, on page 36 of the PPM, Paramount referred to press reports about the March 2004 Viacom board meeting, suggesting that Paramount would pursue a more aggressive approach to the “development and production” of films. (A-3305.) Yet, Paramount failed to address the change in foreign rights strategy that had emanated from that *same meeting*. (Pages 11-13, 21-22, *supra*.) Paramount thus pretended to appear candid and providing current information from the same source while it withheld related and important information.

Third, the PPM states:

Paramount will control all decisions (business, creative or otherwise) relating to *development and production* of each picture *and* whether to pursue and consummate any *co-financing transaction*.... Moreover, Paramount has the right to change its business strategy with respect to the *development and production* of motion pictures.

(A-3305 (emphases supplied).) The trial court did not analyze this statement in its Decision.

This language further evidences Paramount’s intent to lull and mislead investors. First, Paramount specifically distinguished between the “development and production” of motion pictures, on the one hand, and “co-financing transactions” relating to motion pictures, on the other hand. Paramount then reserved the right to “change its business strategy” only “with respect to the

development and production of motion pictures.” This language in the PPM corresponds precisely to McGrath’s March 2004 explanation to Paramount’s placement agent, Merrill Lynch, that Paramount was considering a more aggressive strategy only with respect to its development of bigger budget films, but not “as it relates to risk management and deal making.” (A-2088.)

Paramount wanted and intended this language in the PPM to misdirect investors into believing and accepting, wrongly, that Paramount’s co-financing strategy and techniques for the Melrose Slate would not be markedly different from Paramount’s historical practices as reflected in the HDS.

Fourth, the PPM states:

Paramount selectively pursues and enters into co-production agreements, studio “shared pot” deals, split rights deals and similar arrangements under which, depending on the situation, either Paramount enters into an arrangement with a third party pursuant to which the party agrees to share in the cost of production of one of Paramount’s films in exchange for obtaining certain distribution rights from Paramount or vice versa.

(A-3308.)

While accepting that this is a present-tense statement, the trial court found that “‘selective’ is not a word of commitment, of quantity. Shared pot deals are various kinds of forms of diversification. There were five split rights in the Melrose Slate.” (SPA-7, Tr.1612:19-1613:3.) Again, the trial court confused concepts and made clearly erroneous findings as a result.

The trial court's focus on the word "selectively" missed the point. As discussed above, Paramount concealed from its investors the fact that it did not presently intend to "pursue" or "enter" into *any* further territorial sales after the PPM was issued (and Paramount did not actually do so), "selectively" or otherwise. (Pages 10-15, *supra*.)

Furthermore, as discussed above, shared pot deals are not the same as territorial sales. (Pages 9-10, 18, *supra*.) Thus, while this statement in the PPM may have accurately indicated Paramount's ongoing intention at the time of the PPM's issuance to pursue and enter into shared pot deals, the statement's further indication of Paramount's ongoing indication also to pursue and enter into "split rights deals and similar arrangements" was false and misleading when made.

F. Appellants Actually And Justifiably Relied On The PPM And The HDS

It is undisputed that Appellants are all sophisticated investors. Appellants each received the Melrose PPM, the HDS, and a Subscription Agreement. (A-4806-29; A-4852-59; A-4549-4669; A-3422-49; A-4705-4805; A-4166-92; A-315, Tr.479:23-480:4; A-516, Tr.1045:22-1046:5.) The Subscription Agreement makes clear that Appellants were permitted and expected to evaluate the Melrose Transaction according to the PPM and the HDS.

Specifically, the Subscription Agreement provides that each "Investor shall use [] Proprietary Information" provided by Paramount "for the purpose of

evaluating the Securities.” (A-3435 §9(b).) “Proprietary Information” is defined in the Subscription Agreement to include the HDS. (A-3434-35 §9(a).) The Subscription Agreement additionally states each investor “has based its decision to purchase the Securities” upon the information in the Subscription Agreement, the PPM and the HDS (as well as other collateral agreements). (A-3435 §4(c).)

Appellants actually evaluated and relied upon the language of the PPM, including relying on Paramount’s misrepresentations that it planned to engage in territorial sales. (A-248, Tr.347:11-22; A-490-91, Tr.942:17-944:1; A-598, Tr. 1215:6-1216:3; A-599, 1218:1-1219:8; A-601, Tr.1228:9-1229:2; A517-18, - Tr.1050:24-1051:16.) Appellants also analyzed the data in the HDS through a sophisticated modeling technique known as a “Monte Carlo Simulation,” wherein variable film production and performance data is randomized using thousands of computer iterations to derive a bell curve of probable outcomes. (A-409, Tr.730:2-731:20; A-1292, Tr.27:8-20; A-451-52, Tr.898:2-900:7; A-246, Tr.338:2-341:19; A-491, Tr.945:3-946:10; A-495, Tr.962:3-16; A-597, Tr.1211:12-1212:7; A-4219-32; A-3450-63; A-3251-59; A-3370-82; A-2754-57; A-2763-65.)

The Monte Carlo Simulation allowed Appellants to vary data that might reasonably be expected to change, such as box office revenues. None of Appellants varied territorial sales data from the HDS because (a) Paramount had represented that it intended territorial sales for the Melrose Slate to be generally in

line with the data in the HDS (A-274, Tr.451:16-453:6; A-245, Tr.341:13-19); and (b) Paramount controlled its ability to engage in territorial sales. (A-3300; A-3305; A-3308; A-524, 1076:12-1077:17; A-323, Tr.512:18-513:7.) (*See generally*, A-3450-63; A-3251-59; A-3370-82; A-2754-57; A-2763-65.)

Paramount contended during the litigation that it had tried to put Appellants on notice that the Melrose Slate of films would not be subject to nearly the level of territorial sales as films in the HDS by providing Appellants with a report called “Release Slate Elements,” which, according to Paramount, provided contemporaneous information to Appellants reflecting no significant territorial sales activities. (A-3233-41; A-4678-86.) This contention by Paramount is false.

First, contrary to Paramount’s insistence that it had tried to be forthright and clear about its anticipated large drop in territorial sales for the Melrose Slate, there is not a single document or piece of testimony reflecting any effort by Paramount to state that it intended to reduce its territorial sales drastically as between the HDS and the Melrose Slate.

Second, the “Release Slate Elements” reports all included prominent disclaimers stating that the information reflected was “TENTATIVE,” “SUBJECT TO CHANGE” and “LIKELY TO BE ADJUSTED FROM TIME TO TIME.” (A-4679.) Indeed, the Release Slate Elements reports addressed only 19 of the 25 films that would ultimately be part of the Melrose Slate (although, at the time of

dissemination, investors had no way of knowing how many more films would be included in the slate), and failed to identify two of the most significant films: *War of the Worlds* and *Mission: Impossible III*. (A-4679-82.)⁸

The Release Slate Elements reports also reiterated that they were incomplete and unreliable by stating that the reported information “*excludes all anticipated co-financing amounts not otherwise specifically included.*” (A-4681 (emphasis supplied).) The trial court did not address any of these facts in the Decision.

Nor was the information reported in the Release Slate Elements updated by Paramount. Although Paramount sent multiple reports in June and July 2004, each report was identical and reported information only “as of May 27, 2004.” (A-4549; A-4642-45; A-4678-82.)

Thus, the Release Slate Elements reports were not contemporaneous warnings to investors that Paramount intended to abandon its territorial sales activities for the Melrose Slate, nor did Paramount intend those reports to serve such a function. As discussed above, McGrath had told Hoffman at Merrill Lynch that investors should *not* view the Release Slate Elements reports as accurate with respect to territorial sales information. (Pages 23-25, *supra*.)

Paramount’s reliance on the Release Slate Elements reports faced a further problem that the trial court did not address in its Decision. The evidence showed

⁸ Paramount’s damages expert asserted that there could have been as many as 37 films in the Melrose Slate.

that Paramount did not send Appellant Marathon the same Release Slate Elements reports that Paramount sent to other investors, including Appellants NewStar and Munich Re. (A-4678-86; A-5157-65; A-2754-57; A-600, Tr.1224:15-1225:16.)

Instead, Paramount sent Marathon a separate document purporting to contain similar information but that included only dashes in the “territorial sales” line where other investors received reported figures. (A-2754-57; A-601, Tr.1228:1-8.) This was done because Marathon had requested other information from Paramount to identify the territorial sales breakdown in the HDS more precisely, and Paramount did not want to enable Marathon to compare that specific information with the specific “territorial sales” line item in the Release Slate Elements reports for the Melrose Slate. (A-2735-44; A-598, Tr.1214:18-1217:22.) Paramount falsely represented to Marathon that the territorial sales data for the Melrose Slate was “confidential” at the time to Paramount, even though Paramount disclosed that same information to other investors, including NewStar and Munich Re. (A-2762; A-4678-86; A-5157-65; A-2754-57.)

In addition to seeking more information about territorial sales in the HDS and incorporating those same general co-financing levels into its Monte Carlo Simulations for the Melrose Slate, Marathon also retained a film industry expert from the consulting firm Houlihan Lokey to generally advise Marathon about the Melrose transaction. (A-2713-14; A-540, Tr.1139:9-1140:5.)

Munich Re similarly retained a film industry expert, Harris Maslansky, to reverse-engineer the data in the HDS to determine if it raised any red flags, and, finding no cause for alarm, Munich Re similarly accepted the general co-financing levels from the HDS in its Monte Carlo Simulations. (A-274, Tr:451:16-453:6; A-519, Tr.1056:15-24; A-520, Tr.1061:12-1062:5.)

NewStar consulted with the Moody's ratings agency, which was evaluating the Melrose deal, and received a second opinion from Moody's confirming that it was analyzing the Melrose transaction in the same way that NewStar was doing, including accepting the general co-financing levels from the HDS in its Monte Carlo Simulations. (A-3370-82; A-496, Tr.965:5-966:24.)

G. There Are No Waivers Or Disclaimers That Bar Appellants' Claims

Paragraph 4(s)(iii) of Appellants' Subscription Agreements disclaims any representations by Paramount that the Melrose Slate of films "will be distributed in any particular manner or that such distribution will be continuous." (A-3432.) Paragraph 4(t) then provides that Appellants "waive and release" Paramount "from liability arising out of the matters described in paragraph 4(s)." (A-3433-34.)

The trial court found the terms "distribute" and "distribution" to encompass Paramount's film co-financing activities, and on that basis found that Appellants could not justifiably rely upon Paramount's representations about its territorial

sales strategy for the Melrose Slate. (SPA-5, Tr.1603:17-1604:10.) This was further error that should be reversed.

Paragraph 4(s)(vii) makes clear that film “distribution” refers to the manner in which films are marketed and delivered to the public for viewing, not to the financing required to produce films. (A-3432.) Paragraph 4(s)(vi) reserves to Paramount the decision of how much to spend to market and distribute. (*Id.*) Again, there is no reference to film financing. And Paragraph 4(s)(iii) disclaims any representations by Paramount that its “distribution [of films in the Melrose Slate] will be continuous,” which obviously does not refer to film financing. (*Id.*)

The Melrose PPM likewise expressly distinguishes between film “distribution” and film “financing” as distinct activities. The PPM explains that, “[t]hrough its film division, Paramount produces, *finances* and *distributes*” motion pictures. (A-3724 (emphases supplied).) The operative documents between the parties support only one conclusion: that “distribution” and “financing” of films are not the same thing.

The trial court’s contrary finding was not based on the governing documents or anything else in the record. It was based instead on the trial court’s own, unsupported pronouncement on the meaning of “distribution.” The Decision states:

I do find that distribution is a term which sometimes encompasses financing and sometimes may just be about transferring a picture from here to there. *But always it’s in connection with money. Distribution of films has never been disconnected from the financial implications*

of money. Financing can, of course, have a broader definition and may or may not have anything to do with actual distribution. So financing can be one term, and it may at times incorporate distribution, but it may at other times not. Distribution always incorporates money.

(SPA-5, Tr.1603:17-1604:10 (emphasis supplied).) This finding should be reversed.

Similarly, while the trial court acknowledged well established law that general, as opposed to specific, disclaimers of liability may not exculpate a party from its fraud, the trial court nonetheless relied on general disclaimers in the Subscription Agreement to do just that.

Specifically, the trial court relied on paragraph 9(f) of the Subscription Agreement, which states only generally that Paramount does not “make[] any express or implied representation or warranty as to the accuracy or completeness of any Proprietary Information.” (A-3436 §9(f).) The trial court also relied on paragraph 16 of the Subscription Agreement, which includes a litany of general disclaimers. (A-3437 §16.) None of those provisions specifically disclaims Paramount’s liability for fraud arising out of its territorial sales activities.

The trial court further relied on “[t]he first page of the PPM [which] states it should not be a basis for any investment decision, and none of Merrill Lynch or Paramount have any obligations for forward-looking statements, and that there is no standing or recourse against Paramount.” (SPA-5-6, Tr.1605:25-1606:6.) The trial court found: “that is a statement which has real meaning and does indicate

that the plaintiffs here should not have had standing or recourse against Paramount.” (*Id.*) Nevertheless, Paramount’s unilateral disclaimer of fraud in a transaction sponsored by and attributed to it is ineffective. Judge Griesa ruled twice that Appellants’ claims are not barred by the *Janus* doctrine, and Judge Forrest declined in the Decision to disturb Judge Griesa’s ruling. (A-11-12; A-19.)

The trial court also made no effort to reconcile the language in paragraph 4(c) of the Subscription Agreement discussed above, which states that: “The Investor *has based* its decision to purchase the Securities” upon, *inter alia*, the PPM. (A-3428-29 (emphasis supplied).)

Thus, the trial court made new law that sophisticated investors cannot rely on a private placement memorandum as “a basis for any investment decision.” What “sophisticated investors” like Appellants must do in the face of general disclaimers in the future, according to the Decision, is “get a rep[resentation]” or warranty about every specific thing they care about, regardless of any representations made in a private placement or offering memorandum about those matters. (SPA-13, Tr.1635:22-23.) That is not, and should not be, the law.

SUMMARY OF ARGUMENT

Appellants demonstrated that in the five-year period prior to their investment, Paramount territorially sold 24.1% of the aggregate production cost of its films. Appellants also demonstrated that only 3.2% of the aggregate production

cost of films in Melrose Slate had been offset by territorial sales: a drop of over 85%. Appellants also showed that Paramount consciously misrepresented its intention to continue “business as usual” while having secretly abandoned its use of territorial sales.

Nonetheless, after a bench trial, the trial court awarded judgment to Paramount finding that Appellants’ claims did not “make a lot of sense” to her “from a business perspective” and that the levels of territorial sales in the Melrose Slate were not materially different from the territorial sales levels in the HDS. These findings infect the Decision throughout, are clearly erroneous and should be reversed.

STANDARD OF REVIEW

On appeal from a Rule 52(c) judgment on partial findings, the district court’s findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. *Austrian Airlines Oesterreichische Luftverkehrs AG v. UT Fin. Corp.*, 336 F. App’x 39, 40 (2d Cir. 2009). Mixed questions of fact and law are reviewed *de novo*. *E.g., Travellers Int’l, A.G. v. Trans World Airlines*, 41 F.3d 1570, 1575 (2d Cir. 1994).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT A WAIVER AND DISCLAIMERS BARRED APPELLANTS' CLAIMS

A. Appellants Did Not Waive Their Claims

The trial court erred by relying on its own belief that the term “distribution,” as used in the waiver provisions of Paragraphs 4(s) and 4(t) of the Subscription Agreement, must be taken to mean “financing,” instead of analyzing, according to applicable contract interpretation principles, how those terms are actually used in the Subscription Agreement and the PPM. The Decision’s finding that Appellants’ waived their claims under Paragraph 4(t) should be reversed.

As discussed above, the Subscription Agreement and the PPM both use the terms “distribution” and “financing,” but *not* interchangeably. (Pages 35-37, *supra*.) “Distribution” is specifically and repeatedly used to describe the dissemination of films, not the financing of films. (*Id.*) Paragraph 4(s) of the Subscription Agreement specifically equates “distribution” with the “release pattern” of films. (*Id.*) The PPM expressly states that “Paramount produces, finances *and* distributes” motion pictures. (*Id.*)

Such distinct uses should have been credited by the trial court as a matter of law. *E.g., LaSalle Bank Nat’l Ass’n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) (“An interpretation of a contract that has the effect of rendering

at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible.”) (citations omitted).⁹

Instead of conducting this requisite analysis, the trial court decided – on the basis of no evidence – that “[d]istribution always incorporates money,” that “[d]istribution of films has never been disconnected from the financial implications of money,” and that “always it’s in connection with money.” (Pages 36-37, *supra*.) Not only is that finding objectively incorrect and unsupported, but it contradicts the manner in which the terms “distribution” and “financing” are actually used in the documents.

This Court recently encountered a similar situation, in *Sleepy’s LLC v. Select Comfort Wholesale Corp.*, No. 12-4437-cv, 2015 U.S. App. LEXIS 3034 (2d Cir. Feb. 27, 2015), and reversed a Rule 52(c) judgment because of a similar lower court error. In *Sleepy’s*, the trial court found that a dealer agreement had “expired” by its own terms and, relying on another provision concerning the “termination” of the agreement, could not be extended except in certain ways related to the “termination” of the agreement. *Id.* at *10-11. Thus, the trial court “treated ‘expiration’ and ‘termination’ as interchangeable terms referring to the end of the contract term, regardless of how it occurred.” *Id.* at *11.

⁹ The Subscription Agreement is interpreted according to New York law. (A-3437.)

This Court reversed, finding that the trial court’s “construction of the contract was erroneous” because it failed to account for the manner in which the agreement “does indeed use those terms to refer to different ways of ending the contract term.” *Id.* at *11.

The trial court in this case committed the same error, and reversal is similarly warranted.

B. Paramount Did Not Disclaim Its Liability For Fraud

The trial court also erred by looking to a series of general disclaimers in the Subscription Agreement, PPM and associated agreements to find that Appellants’ claims for fraud were barred. (SPA-6, Tr.1606:3-6.)

The law is well established that a party cannot immunize itself from liability for fraud through general disclaimers. *E.g., Turkish v. Kasenetz*, 27 F.3d 23, 27-28 (2d Cir. 1994); *Kalisch-Jarcho, Inc. v. New York*, 58 N.Y.2d 377, 384-85 (1983).

Paramount engaged in fraud. Paramount repeatedly represented in the Melrose PPM that it would “pursue” territorial sales of films in the Melrose Slate, “opportunistically” and “selectively.” (A-3300, A-3308.) Paramount invited Appellants to rely on the HDS in “evaluating the Securities” and informing the meaning of the PPM. (A-3567 §9(b).) Paramount had its executives falsely reaffirm to investors that the co-financing strategy for the Melrose Slate would not be “fundamentally change[d]” from the strategy reflected in the HDS, and that

territorial sales would continue “in much the same manner as we always have” and in accord with “the historical levels.” (A-2088.) And Paramount concealed its true intention not to pursue (opportunistically, selectively, or otherwise) a single territorial sale after issuance of the PPM, and to reduce territorial sales by 85% relative to the HDS (which caused over \$18 million in additional losses to Appellants than they otherwise would have suffered). (A-3819; A-3845-68.) That is fraud.

There are no specific disclaimers that apply to Paramount’s co-financing strategy. Most notably, Paramount specifically reserved “the right to change its business strategy *with respect to the development and production* of motion pictures.” (A-3305.) Paramount did not reserve the same right with respect to “co-financing transactions,” which are distinguished from “the development and production” of motion pictures and are separately addressed in the PPM. (A-3274-75; A-3277; A-3279-81; A-3305.) *See, e.g., VKK Corp. v. NFL*, 244 F.3d 114, 130 (2d Cir. 2001) (applying doctrine of *expressio unius est exclusio alterius*).

The trial court’s reliance on language that Paramount reserved the right “whether to pursue or consummate any co-financing transaction” on a film-by-film basis is misplaced. (A-3305.) That language does not reserve the right to change Paramount’s co-financing “strategy,” as Paramount did with respect to its

“development and production” of films. Paramount knew how to say the word “strategy” when it wanted. *See Sleepy’s*, 2015 U.S. App. LEXIS 3034, at *11.

The trial court’s reliance on language within the first page of the PPM that the PPM should not be “the basis for any investment decision” is also misplaced. (A-3265.) For one thing, that is, at most, a general disclaimer that cannot absolve Paramount of liability for fraud as a matter of law. Moreover, the trial court overlooked that this language (for whatever it may be worth) is specifically vitiated by Paragraph 4(c) of the Subscription Agreement. (A-3560-31.) *See, e.g., Capital Ventures Int’l v. Republic of Arg.*, 652 F.3d 266, 271 (2d Cir. 2011) (explaining that New York follows rule that “a specific provision . . . governs the circumstance to which it is directed, even in the face of a more general provision”).

The other “general disclaimers” relied upon by the trial court in its Decision are equally ineffective. (SPA-5-6, Tr.1604:12-1608:17.)

Likewise, the trial court erred in finding that Appellants’ only means of bringing suit would have been to “get a rep” guaranteeing a specific level of territorial sales because of their “sophistication.” (SPA-13, Tr.1635:22-23.) “Sophisticated investors are entitled to the protection of section 10(b) of the Securities Exchange Act” like anyone else. *Quintel Corp., N.V. v. Citibank, N.A.*, 596 F. Supp. 797, 802 (S.D.N.Y. 1984) (string citation omitted); *accord United States v. Schlisser*, 168 F. App’x 483, 486 (2d Cir. 2006). There is no law that says

sophisticated investors may not rely on the language of offering materials and must seek extrinsic assurances in excess of what offering materials represent. *See, e.g., Brown v. E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993) (referring to an investment prospectus as “the single most important document and perhaps the primary resource an investor should consult”).

II. THE TRIAL COURT ERRED IN FAILING TO FIND FALSITY

As discussed in detail above, the trial court clearly erred in finding that Paramount’s territorial sales strategy and practices for the Melrose Slate did not materially deviate from Paramount’s “business as usual” as reflected in the HDS. (Pages 2-5, 15-21, *supra*.) The trial court’s findings cannot be squared with the evidence and should be reversed.

III. THE TRIAL COURT ERRED IN FAILING TO FIND MATERIALITY

The trial court similarly erred in finding that territorial sales would not have been “material” to Melrose’s investors. (SPA-13-14, Tr.1634:14-1638:25.) *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1998) (information is material “‘if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to invest’”) (citation omitted).¹⁰

¹⁰ In part, the trial court mistakenly relied on the subjective standard of “actual reliance” in finding no objective “materiality.” (A-739-40, Tr.1635:19-1638:18.) As explained in section VI.B., *infra*, the trial court’s finding of no actual reliance was also erroneous.

Judge Griesa had observed the materiality of Paramount's changed territorial sales strategy early in this case, calling the change "something that would inevitably be important to such an investor." (A-97, Tr.33:5-12.) Judge Griesa's observation was correct.

In finding no materiality, Judge Forrest confused forms of risk mitigation and found that Appellants should not be heard to complain about territorial sales in particular because Paramount engaged in other kinds of risk mitigation, including: (i) "continu[ing] to make and market movies ... according to its best business judgment at the time" and continuing to try to make "good film[s] ... with solid stars who are known to the box office to be a good draw," which the trial court described as "a form of risk mitigation" (SPA-8, Tr. 1617:15-19, Tr.1616:2-6); (ii) continuing to enter into shared pot deals, which the trial court described as "various kinds of forms of diversification" and risk mitigation even though the evidence is uncontroverted that shared pot deals and territorial sales are not fungible (SPA-7, Tr.1612:25-1613:1; A-641, Tr.1386:4-1388:8; A-243, Tr.326:17-327:8; A-164, Tr.152:6-25); and (iii) forming Melrose LLC, which "was itself a form of risk mitigation" (although not benefiting investors) (A-735, 1618:4-5). These findings failed to address the real issue in the case.

The objective materiality of Paramount's territorial sales strategy is evident by the PPM's repeated discussions of its territorial sales strategy and practices. (A-3275; A-3280-81; A-3300; A-3308.)

Materiality is also evidenced by Paramount's specific focus on "Retaining More Foreign Rights" in its March 2004 Viacom board meeting, and by Paramount's efforts to mislead investors after the *Wall Street Journal* article discussing that meeting into thinking that "[t]he intention [of Paramount] is to continue to enter into ... territorial sales ... in much the same manner as we always have." (A-2088.)

Materiality is further evidenced by Moody's questioning about territorial sales of the Melrose Slate in deciding how to rate the Melrose bonds. (A-2459-65; A-2587-93; A-2466.)

And, of course, materiality is demonstrated by the fact that knowledgeable investors like Appellants all considered territorial sales to be important. (A-248, Tr.347:11-22; A-490-91, Tr.942:17-944:1; A-598, Tr.1215:6-1216:3; A-599, 1218:1-1219:8; A-601, Tr.1228:9-1229:2; A517-18, Tr.1050:24-1051:16.)

The trial court's finding of no materiality should be reversed.

IV. THE TRIAL COURT ERRED IN FAILING TO FIND ACTIONABLE MISREPRESENTATIONS AND OMISSIONS IN THE PPM

Because the trial court confused and conflated certain other forms of what the court found to be "risk mitigation" with territorial sales, and because the trial

court also overlooked the parties' stipulation and further erroneously distinguished between territorial sales and split rights deals, the trial court found that the Melrose PPM included no actionable misrepresentations or omissions because, according to the trial court, Paramount conducted "business as usual" with the Melrose Slate. (SPA-8, Tr.1617:16-23.) This finding is infected by the trial court's misapprehension of the facts and should be reversed.

A statement is actionable under Section 10(b) when it is literally false or a "half-truth[]," meaning "literally true statements that create a materially misleading impression." *SEC v. Syron*, 934 F. Supp. 2d 609, 627, 629 (S.D.N.Y. 2013) (citations omitted) (finding that prefatory paragraph in financial statements "establishe[d] the baseline against which to judge the accuracy of the company's disclosures"); *see also McMahan & Co. v. Wherehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990) ("Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors.").

An actionable omission exists when a reasonable investor could "scour the relevant prospectuses" and not be able to understand "the real nature of the arrangement" that is being concealed. *In re Smith Barney Transfer Agent Litig.*, 290 F.R.D. 42, 48 (S.D.N.Y. 2013); *accord Fogarazzo v. Lehman Bros.*, 232 F.R.D. 176, 186 (S.D.N.Y. 2005); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 298

(S.D.N.Y. 2003); *see also In re Parmalat Sec. Litig.*, Nos. 04 Civ. 0030, 04 MD 1653 (LAK), 2008 U.S. Dist. LEXIS 64296, at *32 (S.D.N.Y. Aug. 20, 2008).

As explained above, the PPM's representations about Paramount's "opportunistic" and "selective" pursuit of territorial sales are literally false because Paramount failed to show that it pursued *any* territorial sales after the PPM was issued. (Pages 13-15, 25-27, 29-30, *supra*.) There was no "business as usual" by Paramount after the PPM.

Alternatively, to the extent Paramount relies on the four deals it executed prior to the PPM's issuance, constituting only 3.2% of the aggregate Melrose Slate production cost, the PPM's representations are actionable "half-truths." When compared to the HDS data showing an 85% higher level of territorial sales, it is unreasonable to conclude that such a drop is a continuation of "business as usual." *Cf. In re Prudential Sec. Ltd. P'ships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("The doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away.").

The PPM additionally includes actionable omissions. A reasonable investor could scour the PPM and the HDS and remain unaware that Paramount had privately decided, months earlier, to abandon its historical and "usual" territorial sales in connection with the Melrose Slate. (Pages 10-15, *supra*.) The March 18,

2004 e-mail from Tom McGrath to Paramount’s placement agent, Merrill Lynch, shows that Paramount tried to ensure misapprehension of the PPM by potential Melrose investors. (Pages 21-24, *supra*.)

Accordingly, the trial court’s findings that there are no actionable misrepresentations or omissions in the Melrose PPM should be reversed.

V. THE TRIAL COURT ERRED IN FAILING TO FIND SCIENTER

Plaintiffs may show scienter through “evidence of conscious misbehavior or recklessness.” *Gould v. Winstar Commc’ns, Inc.*, 692 F.3d 148, 158 (2d Cir. 2012); *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983). The element may be established (i) “when it is clear that a scheme, viewed broadly, is necessarily going to injure” or where actions “can be foreseen to result in harm,” *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 220-221 (2d Cir. 2000); or (ii) by conduct that was “highly unreasonable, representing an extreme departure from the standards of ordinary care.” *Gould*, 692 F.3d at 158.

The trial court committed clear error in failing to recognize Paramount’s intent to deceive. By reducing territorial sales, Paramount preserved the possibility of gaining more “upside” on the bigger budget movies that Paramount planned to make. (A-151, Tr.98:25-99:10; A-412, Tr.740:17-741:9; A-177, Tr.201:10-202:17; A-641, Tr.1386:13-21; A-1308, Tr.90:20-91:21.) By having the Melrose investors in place, however, Paramount mitigated its *own* potential downside. The trial court

observed as much when it found that Melrose LLC “was itself a form of risk mitigation” – but only *for Paramount*. (SPA-9, Tr.1618:4-5.) This same reality is reflected in Badagliacca’s April 2004 ‘zero-sum game’ report, and in Paramount’s PowerPoint presentation: the “Impact Of Financing” from Melrose was that Paramount would “Retain More Foreign Rights.” (A-2125-32; A-3915.)

Had Paramount been forthright about its plan to reduce territorial sales, it ran the risk of scaring away potential Melrose investors (like Appellants) who were investing in material part because of Paramount’s well-known conservatism. (*E.g.*, A-240-41, Tr.316:11-318:4.) This is precisely why Merrill Lynch sought urgent clarification from Paramount after a purported “new mantra” of risk-taking was reported by the *Wall Street Journal* in March 2004, and why McGrath misled Merrill Lynch into reporting back to investors that Paramount’s “new mantra” pertained only to film development and production, *not* to Paramount’s co-financing strategies. (Pages 21-25, *supra*.)

The trial court inexplicably credited the testimony of Paramount’s witnesses who had created the PowerPoint but professed, to a person, not to recall or understand what the words in the PowerPoint meant. (A-1091-92, Tr.63:7-67:10; A-1050, Tr.92:17-93:14; A-881-82, Tr.108:13-109:13; A-1074, Tr.79:2-80:15; A-1008, Tr.75:12-16.)

Because the trial court credited such practiced ignorance by Paramount's witnesses, it found that the PowerPoint could not be taken to mean what it says, and thus could not be considered evidence of scienter. (A-738, 1632:5-14.) That finding was clearly erroneous. *See, e.g., Presley v. U.S. Postal Serv.*, 317 F.3d 167, 176-77 (2nd Cir. 2003) (Sotomayor, J.) (vacating findings of fact because trial court had clear misimpression of the evidence).

The trial court committed further error in not allowing Paramount's Rule 30(b)(6) witness in discovery, Karen Magid, Esq., to be cross-examined at trial as a corporate representative, and requiring Appellants to ask questions of Ms. Magid only in her personal capacity. (A-595, Tr.1203:13-18.) *See Sciarretta v. Lincoln Nat'l Life Ins. Co.*, No. 13-12559, 2015 U.S. App. LEXIS 2864, at *11-13 (11th Cir. Feb. 26, 2015); *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 434 (5th Cir. 2006); *Union Pump Co. v. Centrifugal Tech., Inc.*, 404 F. App'x 899, 907-08 (5th Cir. 2010); *Sara Lee Corp. v. Kraft Foods, Inc.*, 276 F.R.D. 500, 503 (N.D. Ill. 2011).

Because of the trial court's erroneous handling of Ms. Magid's testimony, Ms. Magid was permitted to profess ignorance as an "individual" (which she did to an astonishing degree), and "Paramount" was not required to be cross-examined during the trial.

The evidence of Paramount's conscious misbehavior (or at least recklessness with the truth) was equally clear from Paramount's documents. Again, McGrath's March 18, 2004 e-mail to Merrill Lynch about the *Wall Street Journal* article is compelling. (Pages 21-24, *supra*.) Instead of taking the opportunity to be forthcoming, McGrath had and used that opportunity to deceive by assuring Merrill Lynch (with the expectation that this message would be relayed to Melrose's potential investors) that he "was intimately involved in preparing the materials for that meeting and they do not suggest fundamental changes in strategy." (A-2088.) McGrath also purported in his e-mail to quote from the PowerPoint that he had prepared, but he omitted the important language about the "Impact of Financing" from Melrose that preceded the language about Paramount's decision to "Retain More Foreign Rights." (A-2088; A-3915.) McGrath additionally insisted that territorial sales, specifically, would continue for the Melrose Slate "in much the same manner as we always have" (*i.e.*, as reflected in the HDS). (A-2088.)

The trial court's finding that McGrath's e-mail is "so vague and general" and "insufficient standing alone to establish an intent to defraud" is clearly erroneous.

In addition, Paramount deceived Appellants when it manipulated its Release Slate Element reports to create a virtual 'shell game' of information about

territorial sales upon false claims of “confidentiality,” so that each Appellant would receive only pieces of information about territorial sales and no Appellant would ever be handed the complete universe of relevant information. (Pages 32-34, *supra.*)

Of course, Paramount’s intent to deceive is also apparent from the Melrose PPM, which Paramount was able to craft as it desired, and which is materially false and misleading with respect to the matter of territorial sales. (Pages 25-30, *supra.*)

Because the trial court could not itself imagine a business reason for Paramount to deceive Appellants about its territorial sales strategy, the trial court credited the conclusory testimony by Paramount’s witnesses and gave no credit to Paramount’s own documents. The trial court’s finding of no scienter by Paramount should be reversed.

VI. THE TRIAL COURT ERRED IN FAILING TO FIND RELIANCE

A. Reliance Should Have Been Presumed By The Trial Court

Because the PPM includes actionable omissions, the trial court should have presumed reliance in this case under the doctrine of *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). It was erroneous for the trial court not to do so. *See In re Parmalat Sec. Litig.*, 2008 U.S. Dist. LEXIS 64296, at *32; *Fogarazzo*, 232 F.R.D. at 186; *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. at 298.

B. The Trial Court Erred In Finding No Actual Reliance

Actual reliance, or transaction causation, is established by showing that a securities purchaser “likely would not” have purchased the securities if it had known about a misrepresentation or omission. *AUSA Life Ins. Co.*, 206 F.3d at 209. The test is subjective and focused on the investing decision of the plaintiff itself. *See, e.g., McMahan & Co. v. Wherehouse Entm’t, Inc.*, 859 F. Supp. 743, 753 (S.D.N.Y. 1994) (actual reliance exists where evidence shows that misrepresented element was only “one of the inducements” and only “of some value” in plaintiff’s decision-making).

The evidence of Appellants’ actual reliance on the PPM’s misrepresentations and omissions regarding territorial sales was entirely uncontroverted. Each Appellant testified that it considered Paramount’s pursuit of territorial sales in general accord with the levels reflected in the HDS to be important to its decision-making. (A-248, Tr.347:11-22; A-490-91, Tr.942:17-944:1; A-598, Tr.1215:6-1216:3; A-599, 1218:1-1219:8; A-601, Tr.1228:9-1229:2; A517-18, Tr.1050:24-1051:16.) Each Appellant testified that it would not have invested in Melrose had Paramount been truthful in revealing a plan to reduce territorial sales by 85%. (*Id.*) And each Appellant analyzed the HDS through sophisticated modeling techniques and looked to outside experts to help them understand the data that Paramount had provided. (A-409, Tr.730:2-731:20; A-1292, Tr.27:8-20; A-451-52, Tr.898:2-

900:7; A-246, Tr.338:2-341:19; A-491, Tr.945:3-946:10; A-495, Tr.962:3-16; A-597, Tr.1211:12-1212:7; A-4219-32; A-3450-63; A-3251-59; A-3370-82; A-2754-57; A-2763-65; A-3450-63; A-3251-59; A-3370-82; A-2754-57; A-2763-65.)

The trial court's finding that none of Appellants actually relied on the existence of territorial sales was predicated on the trial court's belief that Appellants should have "drilled down" more in their Monte Carlo Simulations and varied data about territorial sales more severely, and should have also demanded "representations and warranties" about territorial sales in addition to the PPM. (SPA-13, Tr.1635:19-1636:18.) These findings miss the point.

Each Appellant testified that they used the Monte Carlo Simulation to vary data that *was* not in the issuer's control, such as box office performance. (A-274, Tr.451:16-453:6; A-245, Tr.341:13-19; A-3450-63; A-3251-59; A-3370-82; A-2754-57; A-2763-65.) There was no basis for the trial court to reject Appellants' testimony and evidence that each actually relied on its respective Monte Carlo Simulations that incorporated the territorial sales data reflected in the HDS. (SPA-15, Tr.1644:8-12; SPA-3, Tr.1595:8-14.)

Nor was there any basis for the trial court to reject Appellants' testimony that each actually relied on the language (and omitted language) about territorial sales in the PPM, simply because Appellants did not seek additional representations and warranties about specific planned territorial sales levels from

Paramount before investing – representations and warranties that would have been unreasonable to demand in this context and which Paramount conceded never would or could have been granted. (A-697, Tr.1469:19-22.)

C. The Trial Court Erred In Finding No Justifiable Reliance

The trial court erroneously based its finding of no justifiable reliance on its erroneous finding that the PPM and related agreements disclaimed away any possible liability related to Paramount’s territorial sales practices. According to the Decision:

[Y]ou can disclaim your way out of misrepresentation based upon all of the facts and the circumstances in a case, based upon the sophistication of the investor, based upon what work that investor could have done to understand the misrepresentation. Here the work that [Appellants] needed to have done they never began to do. They didn’t model foreign presales [in their Monte Carlo Simulations]. They didn’t dig down into foreign presales.... Now, disclaimers and disclosures make any reliance on the foreign presales and other particular types of risk mitigation strategies unreasonable.

(SPA-15, Tr.1645:6-21.) The trial court misapprehended the law.

First, as explained in Section I.B., *supra*, Paramount did not specifically disclaim its liability related to territorial sales.

Second, the Decision is not, and cannot be, correct that sophisticated investors may not “reasonably” rely on a PPM’s representations, and that sophisticated investors must “drill down” on every investment element that they find important, regardless of what the PPM says about such elements. *See, e.g.,*

Brown, 991 F.2d at 1032 (explaining that only “minimal diligence” into representations is required to show reasonable reliance); *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1016 (2d Cir. 1989) (plaintiff must only demonstrate that it was not “reckless” in its due diligence).

There was no basis for the trial court to find that Appellants were reckless and that they failed to exercise the requisite minimal diligence into the PPM’s representations about territorial sales. Appellant Marathon made specific requests for more information about territorial sales from Paramount (and received different Release Slate Elements reports than other investors as a result under Paramount’s false pretext of “confidentiality”). (A-2735-44; A-598, Tr.1214:18-1217:22; A-2713-14; A-540, Tr.1139:9-1140:5.) Appellant Munich Re hired a film industry expert to reverse-engineer the data in the HDS, including data about territorial sales, to determine if the data seemed unreasonable or raised any red flags (which it did not). (A-274, Tr.451:16-453:6; A-519, Tr.1056:15-24; A-520, Tr.1061:12-1062:5.) And Appellant NewStar consulted with Moody’s to confirm its method of analysis and Monte Carlo modeling because Moody’s was rating the Melrose bonds and had access to more information from Paramount than typical investors (although it was unknown at the time that Paramount had affirmatively misrepresented to Moody’s (through Merrill Lynch) that Moody’s should “look at historical data [*i.e.*, in the HDS] to determine what amounts have been co-financed

by other means [*i.e.*, other than shared pot deals, including territorial sales] *and project that amount going forward*"). (A-3370-82; A-496, Tr.965:5-966:24; A-2594 (emphasis supplied).)

Regardless of the PPM's and associated agreements' general disclaimers, Appellants reasonably relied on the PPM's misrepresentations about territorial sales as a matter of fact and law. *See, e.g., Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004) ("Cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired."); *In re Prudential Sec. Ltd. P'ships Litig.*, 930 F. Supp. at 72.

VII. THE TRIAL COURT ERRED IN FAILING TO FIND LOSS CAUSATION

A plaintiff satisfies the loss causation element of its securities fraud claim if it can show a causal connection between the defendant's alleged misconduct and the economic harm ultimately suffered by the plaintiff. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 186-87 (2d Cir. 2001).

Critically, "proving loss causation in connection with the sale of privately-offered, asset-backed securities ... is a different undertaking from proving loss causation in a typical stock drop case." *AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 646 F. Supp. 2d 385, 403 (S.D.N.Y. 2009), *aff'd*, 386 F. App'x 5, 8 (2d Cir. 2010). Where there is no efficient, public market for securities, a

regression analysis of whether another isolated event may have affected the value of securities is not required to correct for extraneous market conditions. *Id.*; *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 888 F. Supp. 2d 431, 473 (S.D.N.Y. 2012) (“[A] plaintiff may demonstrate loss causation [in a rated notes context] by showing a causal link between the fraud and a decrease in the amount of money returned to plaintiffs over the course of the securitization.”); *accord United States v. Martoma*, 993 F. Supp. 2d 452, 457-58 (S.D.N.Y. 2014); *Pure Earth, Inc. v. Call*, 531 F. App’x 256, 260-61 (3d Cir. 2013).

Appellants proved loss causation through the report of their damages expert, which was admitted for that purpose. (A-3815; A-691, Tr.1444:5-25.) That report – which Paramount did not move to exclude on *Daubert* grounds – reliably linked Appellants’ damages to Paramount’s abandonment of territorial sales and was not disputed by any contrary report offered by Paramount. (A-3867-68.)

The trial court did not take any account of the relevant law cited above in the Decision and relied instead on inapt law dealing with publicly-traded stocks, and on that basis found no evidence of loss causation because Appellants did not produce a regression analysis or otherwise rule out other potential “macro-economic factors” for their losses. (A-743, Tr1651:13-24 (citations omitted).) The Decision is erroneous and should be reversed.

**VIII. THE TRIAL COURT ERRED IN AWARDING
JUDGMENT TO PARAMOUNT ON APPELLANTS'
COMMON LAW FRAUD, FRAUDULENT
CONCEALMENT AND UNJUST ENRICHMENT CLAIMS**

A. The Trial Court's "Fraud" Ruling Should Be Reversed

Under New York law, "[f]raud requires the following elements: (1) representation of material fact; (2) falsity; (3) scienter; (4) reasonable reliance; and (5) injury." *Koch v. Greenberg*, 14 F. Supp. 3d 247, 256 (S.D.N.Y. 2014). Unlike Section 10(b) claims, material misrepresentations that are not "'made to the plaintiff directly'" can be actionable under New York law, "so long as [the] plaintiff is among the 'class of persons' intended to rely on the statement" and the defendant "was a driving force behind" the statement being made. *Id.* at 257, 258 (citations omitted).

In addition to the actionable misrepresentations in the PPM discussed above, Paramount's misrepresentation to Moody's (through Merrill) that historical co-financing data from the HDS should be projected for the Melrose Slate is actionable under New York law. (Pages 23-25, *supra.*) *See Koch*, 14 F. Supp. 3d at 257-58 ("[E]ven if Greenberg's statements were made to Zachys or its owner, rather than to Koch himself, so long as Greenberg reasonably expected auction attendees to rely on those statements . . . they may be actionable representations under New York law.").

In addition, contrary to the trial court's finding, Appellants' sophistication should not have been a bar to relief. *See also, Koch*, 14 F. Supp. 3d at 259-260 (“[I]t was reasonable for the jury to conclude that, in light of all the circumstances, and despite [plaintiff's] sophistication and his right to inspect the bottles [of fake wine], it was unreasonably difficult or impossible for him to have discovered ‘what [defendant] knew.’”) (citation omitted); *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 407, 410-11 (S.D.N.Y. 2004) (“[E]ven had the Banks exercised their right to inspect GC's books, there is no evidence on the present record that they necessarily had the means to discover the fraud.... The mere existence of the right to inquire, without more, is not dispositive.”) (citations omitted).

The Decision states:

And also in New York, you're also to look at sophisticated businessmen and determine whether or not they could have been defrauded in the manner suggested and *it's just not credible to the Court that they could have been. Not these guys.*

(SPA-17, Tr.1653:5-9 (emphasis supplied).)

The trial court erred in finding that Appellants were essentially ‘too sophisticated’ to be deceived as a matter of law.

B. The Trial Court's “Fraudulent Concealment” Ruling Should Be Reversed

The trial court misstated the law in finding that “[o]missions do not exist really in New York State fraud claims.” (SPA-17, Tr.1653:1-2.) “[U]nder New

York law, silence or omission with respect to a material fact can serve as the equivalent of an affirmative misrepresentation where either: (1) ‘one party possesses superior knowledge, not readily available to the other,’ or (2) ‘the party has made a partial or ambiguous statement, on the theory that once a party has undertaken to mention a relevant fact to the other party it cannot give only half of the truth.’” *Koch*, 14 F. Supp. 3d at 258 (citation omitted); *accord JP Morgan Chase Bank*, 350 F. Supp. 2d at 410.

The evidence was clear and convincing that Paramount possessed superior knowledge (relative to Appellants) about its undisclosed plan to abandon territorial sales in connection with the Melrose Slate. (Pages 10-15, *supra*.) The trial court’s award of judgment to Paramount on Appellants’ fraudulent concealment claim should be reversed.

C. The Trial Court’s “Unjust Enrichment” Ruling Should Be Reversed

To state a claim for unjust enrichment under New York law, “a plaintiff must establish 1) that the defendant benefited 2) at the plaintiff’s expense; and 3) that equity and good conscience require restitution.” *Landesbank Baden-Wuerttemberg v. Goldman, Sachs & Co.*, 478 F. App’x 679, 683 (2d Cir. 2012) (citation omitted).

For all the reasons discussed above, the evidence demonstrated that Paramount unjustly enriched itself at Appellants’ expense. The trial court erred in

finding that Paramount acted in “equity” and “good conscience.” (SPA-17-18, Tr.1653:24-1654:12.)

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse in its entirety the Decision below awarding Paramount judgment on all of Appellants’ claims pursuant to Fed. R. Civ. P. 52(c).

Dated: New York, New York
March 16, 2015

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated: New York, New York
March 16, 2015

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SPECIAL APPENDIX

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SPA-1

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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED **OCT 31 2014**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ALLIANZ RISK TRANSFER AG, :
MARATHON STRUCTURED FINANCE :
FUND, LP, NEWSTAR FINANCIAL, :
INC., and MUNICH RE CAPITAL :
MARKETS NEW YORK, INC., :

Plaintiffs, :

08-cv-10420 (KBF)

-v- :

ORDER

PARAMOUNT PICTURES :
CORPORATION, :

Defendant. :

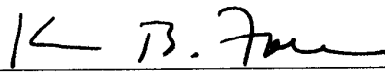
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KATHERINE B. FORREST, District Judge:

For the reasons stated on the record on October 30, 2014, the Court hereby enters judgment for defendant on all three claims in the Third Amendment Complaint. This constitutes the Order and Judgment of the Court.

The Clerk of the Court is directed to enter Judgment and to terminate this action.

SO ORDERED.

Dated: New York, New York
October **31**, 2014


KATHERINE B. FORREST
United States District Judge

**ALLIANZ RISK TRANSFER, INC. et al., v.
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|---|---|
| <p>EAU3ALL6 Rebuttal - Mr. Kendall Page 1590</p> <p>1 20 percent as a component for which Paramount received a fixed 2 amount. The economic effect was the same, plus they got the 3 premier.</p> <p>4 Other than that, your Honor, I don't think I have 5 anything else that I haven't pretty well outlined in my 6 statement. Thank you very much for the Court's attention. And 7 I would leave it at that.</p> <p>8 THE COURT: Thank you.</p> <p>9 Mr. Charron, anything further from you?</p> <p>10 MR. CHARRON: Just one point, your Honor. Only that 11 Mr. Kendall when discussing Mr. Fier's damages aspect of the 12 report made a statement. Mr. Wunderlich, who is in the 13 courtroom today, his report says that there was enough money 14 for 12 more films. And that issue has been before your Honor 15 in other motion practice. I just wanted to highlight -- 12 on 16 top of 25. If I didn't make that clear. So 37. So, I take 17 issue with that statement, that there is some question there.</p> <p>18 THE COURT: I thought that that was if the revenues 19 had been as plaintiffs asserted, then there would have been 20 enough money to have fed back in for the other 12.</p> <p>21 MR. CHARRON: Can I use your Honor's tag rule?</p> <p>22 THE COURT: That's fine. It is not a big point I 23 think.</p> <p>24 MR. JANOWITZ: It I think it is actually a very big 25 point. Because, our clients saw these elements, these release</p> | <p>EAU3ALL6 Rebuttal - Mr. Charron Page 1592</p> <p>1 those documents, the main reason that they discarded them was 2 because of the disclaimer and the fact that they believed 3 things would change. And nobody said, although that's 4 certainly a possibility of change, but nobody specifically 5 called out.</p> <p>6 MR. JANOWITZ: I believe we had -- I believe we had 7 trial testimony which said that they did not know how big the 8 slate would be.</p> <p>9 THE COURT: That's for sure. That I agree. That was 10 it was a moving target, the first four films that were 11 originally considered to be part of it because of timing 12 weren't part of it.</p> <p>13 MR. JANOWITZ: Everybody understood the nature of the 14 deal. So if you understood the nature of the deal, you would 15 have known it then too. It is not a difficult thing to follow.</p> <p>16 THE COURT: All right. Why don't we take a break. 17 And I need to sort through a couple of things and I've got a 18 couple of cases that I need to take a look at. Why don't we 19 take five to 10 minutes. All right.</p> <p>20 (Recess)</p> <p>21 THE COURT: Thank you. I, as you folks know, take a 22 lot of notes and have kept a lot of notes and have now sorted 23 through the notes, as I had really been doing all along. And 24 I'm going to now give my full ruling on the record, including 25 my findings of fact and conclusions of law.</p> |
| <p>EAU3ALL6 Rebuttal - Mr. Charron Page 1591</p> <p>1 slate elements at a point where there were supposedly 20 films 2 addressed, even though those films were not fully addressed. 3 What Mr. Wunderlich is saying, and the reason we have this 25 4 37 dispute is if the presales had been done the way we think 5 they should have been done, it would have turned into a slate 6 of 37 films.</p> <p>7 THE COURT: But then you would have shown a different 8 kind of drawdown as well, because your revenue flow would have 9 been different.</p> <p>10 MR. JANOWITZ: No, your Honor. Revenue has absolutely 11 nothing to do with it.</p> <p>12 THE COURT: We don't even need to go into it.</p> <p>13 MR. JANOWITZ: It is only as a function of the 14 presales. Because presales reduce costs, which means the money 15 can go further. So there is no question that this could have 16 been a 37 film slate, it could have been a 38, it could have 17 been a 40, it could have been a 32.</p> <p>18 The whole point is, that at the 20 point, you didn't 19 know where you were in the slate. And there could have been a 20 great deal ahead of you. So you're standing in the middle of a 21 transaction and you don't know where it's going to end up.</p> <p>22 THE COURT: Is there anybody -- and I'm thinking 23 through Mr. Seery, and I'm not thinking of it in Mr. Seery, and 24 I'm not thinking of where in the record that point was made. 25 In other words, as I understood your client's use or non-use of</p> | <p>EAU3ALL6 Decision Page 1593</p> <p>1 The motion as we know that's been brought was brought 2 pursuant to Rule 52, and as you folks know, that after a party 3 has fully been heard on an issue tried to the bench, the Court 4 can render judgment on partial findings. The Court does have 5 to state its findings with specificity and state its 6 conclusions of law as well.</p> <p>7 What I am going to do now is set forth the findings of 8 fact and those conclusions of law. There will be no separate 9 written opinion. This is it. So you folks will have this, 10 you'll be able to take a transcript.</p> <p>11 As you folks know, you know better than I, you've 12 lived through it, this action was commenced in 2008 and it is 13 now 2014. As you folks know, this matter was transferred to me 14 the day before you began trial. In fact, the day you thought 15 you were going to trial. And you thought it was going to be a 16 jury trial, and it became a bench trial for reasons that I 17 think we've gone over sufficiently.</p> <p>18 The parties have presented both the plaintiffs' 19 affirmative case and then the cross-examination over the course 20 of two weeks. And I do want to say that I appreciate the fact 21 that, as Mr. Charron said, that different judges make different 22 rulings and have different views of things. I understand that.</p> <p>23 It is clear to the Court by more than a preponderance 24 of the evidence that judgment must be and hereby is entered in 25 favor of the defendant.</p> |

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| 1 | I do, however want to say in particular that I think | | 1 | I do want to say that with Springer in particular, he | |
| 2 | Mr. Janowitz and Mr. Charron are extremely professional, | | 2 | was the one who I had the most difficulty with. I found him | |
| 3 | competent trial counsel. That you folks know the law, I | | 3 | overly rehearsed, and to have the talking points that seemed to | |
| 4 | disagree with you on some of your views of the law, but you | | 4 | me to be down almost word for word in some respect as his | |
| 5 | certainly know the cases and are fluent in the cases, that you | | 5 | lawyers. And he did testify, and it was notable at his | |
| 6 | know the facts, and I think it is hard to imagine how anyone | | 6 | deposition, in a manner that lacked recollection which he then | |
| 7 | could have done a better job with the facts that you had. | | 7 | had recollection here. That also is not an extraordinary thing | |
| 8 | In particular, I thought that Mr. Charron's remarks in | | 8 | in and of itself, but it is something that goes into the mix. | |
| 9 | opposition to the motion were particularly well organized, and | | 9 | A separate word on Mr. Sands. I don't rely on his | |
| 10 | did about the best presentation I could imagine on those facts. | | 10 | testimony really at all. It's not because he lacked | |
| 11 | I want to say that because, while I don't agree with | | 11 | credibility. But rather, it's because the Court finds that he | |
| 12 | plaintiffs on their view of the facts, I want you folks to know | | 12 | lacked an adequate methodology to render the opinions that he | |
| 13 | that I did appreciate how you litigated the case. | | 13 | rendered, and a lack of relevance to the extent he rendered | |
| 14 | Let me go on now to some of the other pieces. At this | | 14 | opinions with any basis in fact. I have no doubt that he is | |
| 15 | trial, as you folks know, the Court has received numerous | | 15 | highly experienced in many areas in the movie industry, and | |
| 16 | documents. I have looked at each of the documents to which I | | 16 | that he did all of the things he testified to having done. | |
| 17 | was referred, and also the documents that were contained in the | | 17 | But, nonetheless, the opinions that he rendered weren't | |
| 18 | various binders that were handed to me as received documents. | | 18 | supported with the kind of methodology that would assist the | |
| 19 | So I believe I've looked at all of the documents that I | | 19 | trier of fact here. His opinions appeared to be from the gut. | |
| 20 | received into evidence. Certainly every document that folks | | 20 | Somebody who has got a lot of experience can certainly have | |
| 21 | went over today were documents which had been well-tread. And | | 21 | views from the gut. But, in order to be an expert witness, | |
| 22 | I have a fair amount of familiarity, with the exception of the | | 22 | you've got to vigorously find a way of supporting them, and his | |
| 23 | board minutes which I pulled and looked at, and the exhibit | | 23 | were largely ex post. He also doesn't have the requisite | |
| 24 | from Mr. Badagliacca, 343. Those I've now looked at in | | 24 | experience selling the number of pictures he thought could be | |
| 25 | addition. | | 25 | sold in the number of territories which would have been had to | |
| EAU3ALL6 | Decision | Page 1595 | EAU3ALL6 | Decision | Page 1597 |
| 1 | I have also heard from the various representatives of | | 1 | have been, if not in a row, in relative proximity to one | |
| 2 | the various witnesses. I've heard from Merrill Lynch through | | 2 | another, at least from the Paramount side, given the number of | |
| 3 | Mr. Hoffman, Mr. Maslansky, plaintiff's proposed expert | | 3 | pictures that were going into the Melrose slate. | |
| 4 | Mr. Sands, Paramount's Ms. Magid. I've read the deposition | | 4 | So, his opinions in my view were anecdotal and without | |
| 5 | designations of over a dozen other witnesses. I heard from | | 5 | reference also to certain pertinent facts relating to | |
| 6 | each of the plaintiffs. So I've had access to a fair amount of | | 6 | particular films at issue, as well as the particular marketing | |
| 7 | testimony, some of which has occurred over a number of years. | | 7 | context in which those films would have been marketed. He | |
| 8 | With the exception of Ms. Magid, the Court does find | | 8 | ignored Paramount specific rights as to what it could and could | |
| 9 | that the live witnesses were, frankly, generally rehearsed. | | 9 | not sell. As well as, we've said, the market conditions in | |
| 10 | That's not unusual, however, in cases where there have been | | 10 | 2004. | |
| 11 | depositions and there have been meetings with clients over a | | 11 | Now, I want to note that I have considered each of the | |
| 12 | number of years. But they did have their talking points down. | | 12 | plaintiffs individually. As I go through my remarks, if I | |
| 13 | Sometimes that required the Court to discount testimony, | | 13 | don't call them out in particular each time, it is because I'm | |
| 14 | sometimes it didn't. | | 14 | skipping over something in my notes. But I have in fact given | |
| 15 | With Ms. Magid I do want to note that I heard her | | 15 | consideration to whether or not each of the plaintiffs | |
| 16 | testimony a little differently from Mr. Charron. Mr. Charron | | 16 | individually has met each of the elements. And the result is | |
| 17 | has lived through this case for a lot longer. But the way | | 17 | the same for each of them. | |
| 18 | Ms. Magid came across to the Court when she was testifying was | | 18 | I'm going to now state some findings of fact as well | |
| 19 | as someone who was trying to be forthcoming. And it didn't | | 19 | as conclusions of law. Each of the findings which I state, | |
| 20 | actually strike the Court as particularly unreasonable, | | 20 | each of the factual statements that I make are found by a | |
| 21 | although perhaps a practice that ought to be reconsidered, that | | 21 | preponderance of the evidence. | |
| 22 | a person in a very busy department might sign things which are | | 22 | I find that the plaintiffs are sophisticated investors | |
| 23 | initialed by others. That has happened in my professional | | 23 | who each invested millions of dollars in this security tied to | |
| 24 | experience, so I don't find it to be -- I don't do it, but I | | 24 | the performance, as we know, the Paramount Melrose slate. | |
| 25 | don't find it to be something that is not credible. | | 25 | Their sophistication is evidenced by a number of things that | |

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| <p>EAU3ALL6 Decision Page 1598</p> <p>1 are in the record. It is indeed not even a contested fact. 2 But Merrill Lynch itself stated that, through Mr. Hoffman, that 3 the plaintiffs were sophisticated investors. They each asked 4 for information and due diligence that a sophisticated investor 5 would be expected to do. 6 Allianz's Mr. Flynn as well as Mr. Seery, evident from 7 his deposition designations, were sophisticated investors. 8 Mr. Burnaman had 20 years of experience, and indeed he had 9 provided expert testimony on reps and warrantys in the past. 10 No doubt he was sophisticated and is sophisticated. 11 Mr. Hohmann from Munich Re had significant industry experience 12 and is also certainly sophisticated. Springer with Marathon 13 had significant experience in structured finance. Indeed, 14 Marathon itself specializes in high-yield investments of which 15 it hoped this would be one. And Springer testified that both 16 he and Marathon were generally sophisticated investors. 17 In addition to that, the subscription agreement 18 itself -- more on that in a moment -- which I do find is 19 binding on each of the plaintiff investor has a section in 20 paragraph 4(d) as in David on page eight, and 4(e), in which 21 each of the subscribers represents that each is a sophisticated 22 investor. 23 Now, as it turned out, as we all know, the films on 24 the Melrose slate which was the asset securitized in the 25 Melrose transaction did not do well. And it certainly didn't</p> | <p>EAU3ALL6 Decision Page 1600</p> <p>1 misstatements or the omission were material. I don't find that 2 there is sufficient evidence of scienter. I don't find that 3 there is sufficient evidence of transaction causation or loss 4 causation. 5 The basic claim is that the PPM in isolation or 6 combined with the HDS committed Paramount to maintaining a 7 level of foreign presales for films on the slate that it had 8 previously obtained and/or to engage in the same kind of risk 9 mitigation in the form of a particular type of co-financing, 10 namely foreign presales, that it had done in the past. Or that 11 Paramount omitted to tell the plaintiffs of a changed business 12 practice to do fewer foreign presales, thereby altering its 13 risk mitigation practices. 14 Notably, plaintiffs are not asserting as a result of 15 the Melrose securitization Paramount bound itself in any way 16 not to alter its domestic strategy, but somehow that there were 17 statements that Paramount had bound itself to a particular set 18 of business actions and strategies in foreign territories. 19 The Court also does not find that there was a coverup 20 of a known change in fundamental business plan such as foreign 21 presales. 22 From a business perspective, I would note this doesn't 23 make a lot of sense. If Paramount had bound itself to foreign 24 presales, that does seem to fly in the face of good negotiating 25 strategy, because everybody in the world would then know that</p> |
| <p>EAU3ALL6 Decision Page 1599</p> <p>1 do as well as people had hoped, both Paramount as well as the 2 plaintiffs, and plaintiffs lost their principal as well as the 3 expected full interest, and this lawsuit followed. 4 The plaintiffs made a risky investment. They knew 5 that. They testified to that. There were risks involved. 6 There is no doubt about that. The evidence at trial 7 established that the class B notes were unrated, and that the 8 class A notes were ahead of them in the waterfall. Those class 9 A notes were rated at the lowest level of Moody's before you 10 get to the unrated status, junk status. 11 The witnesses testified to understanding that there 12 were risks in the investment, that the Melrose securities did 13 not provide a guaranteed return. This was not an investment 14 that one would sell to a person trying to preserve capital. 15 That does seem to be clear. This was a bet. The plaintiffs, 16 what they hoped for, it never materialized. All the risks, 17 however, about which they believed they were misled, the Court 18 does find that they were disclosed and that there was no fraud 19 here. 20 The Court also finds in particular that there were no 21 false statements, that there were no actionable omissions, 22 though there was I note one omission before when I went over 23 misstatements and omission, and today I think it's been recast 24 as more omissions. Either way, I don't find that there are any 25 actionable omissions. I don't find that the alleged</p> | <p>EAU3ALL6 Decision Page 1601</p> <p>1 you had given up your negotiating leverage and that they would 2 have to obtain a certain number of foreign presales in certain 3 territories because they would be so bound. So to bind oneself 4 to taking that kind of strategic action doesn't make a lot of 5 sense. Binding Paramount to have to achieve a business 6 arrangement with third parties would have handed them certain 7 leverage and changed dynamics, but the alleged coverup also 8 doesn't make a lot of sense. It doesn't make a lot of sense to 9 hide only one small relatively small piece, although a somewhat 10 big dollar amount, depending on how you count it, in a litany 11 of other pieces. 12 And, frankly, the Court does not find there is a 13 fundamental business change. I'll get to that in a moment. 14 For all of the reasons I'm now going to go into some 15 more detail, on I find that counts one through three judgment 16 is entered in favor of the defendants. 17 There are numerous reason why is this is so. Any one 18 of the elements and the failures in the elements individually 19 and independently can support judgment on each of the claims. 20 I don't think this is, frankly, a close call. 21 I am not going to rule on the Janus issue. I don't 22 think I need to. It is not critical to the Court's 23 determination. And therefore, I'm not addressing that. 24 Now I want to go over the documents that are operative 25 here. Documents which are relevant and that govern the</p> |

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| 1 | relationship. There are two primary documents, but there are | | 1 | Distribution always incorporates money. So far as the record | |
| 2 | some additional documents as well which I want to review. | | 2 | here indicates, which is all of the theatrical releases, all of | |
| 3 | First of all, I want to go over the subscription | | 3 | the films were being shown domestically and in foreign | |
| 4 | agreement which each of the investor plaintiffs signed and is | | 4 | jurisdictions for pay, not for free. | |
| 5 | bound by, and the PPM, the private placement memorandum, as | | 5 | And then of course also in (s)(vii), part of which is | |
| 6 | well as certain of the others. All of these documents are | | 6 | just not applicable, but it talks about the covered pictures | |
| 7 | relevant to the dispute. | | 7 | not being marketed pursuant to a particular plan. | |
| 8 | I do note that I do believe that PX 642, which is the | | 8 | In paragraph 4(t) there is a waiver. And there is an | |
| 9 | subscription agreement, I do believe that the waiver is valid | | 9 | agreement by the plaintiffs in no event to bring any claim. As | |
| 10 | and enforceable. I do believe that plaintiff investors waived | | 10 | I said, I do find that is binding. | |
| 11 | their claims. I also believe that there is no legal reason why | | 11 | Paragraph 9(f) we've been over that. That's | |
| 12 | that claim waiver would not apply as a matter of law. There is | | 12 | important. And paragraph 16 there is the general disclaimer. | |
| 13 | no basis for disregarding the subscription agreement. The | | 13 | General disclaimers of course have some limitations when | |
| 14 | plaintiffs agreed to be bound by it, and they should be so | | 14 | they're not specific. However, they are not to be ignored | |
| 15 | bound. | | 15 | entirely because they are general. They are to be taken into | |
| 16 | Now the subscription agreement notably references the | | 16 | consideration along with the totality of the facts and | |
| 17 | indenture agreement. It references the PPM, it references | | 17 | circumstances. And therefore, the general disclaimer | |
| 18 | internally the LLC and the RPA. Those references are all | | 18 | reinforces the disclaimers referenced elsewhere in the | |
| 19 | contained on page five. And I'll go through as a result some | | 19 | subscription agreement. | |
| 20 | of the other provisions of those agreements, which are | | 20 | The RPA, which is DX 2 is another document that was | |
| 21 | referenced as the investors having been aware of. | | 21 | referenced in the subscription agreement. Paragraph 3.2.1 | |
| 22 | But in terms of the subscription agreement itself, | | 22 | references the covered picture obligations. This was reviewed | |
| 23 | paragraph 4(c), page seven, there's a statement that the | | 23 | at trial. That Paramount shall control all decisions as to | |
| 24 | investor has received and reviewed the information, and it is | | 24 | whether to pursue or consummate any co-financing transactions. | |
| 25 | not basing its decision on any information provided by | | 25 | That was disclosed. Paragraph 10 there is a reference to | |
| EAU3ALL6 | Decision | Page 1603 | EAU3ALL6 | Decision | Page 1605 |
| 1 | Paramount. | | 1 | distribution of covered pictures that Paramount shall have | |
| 2 | Paragraph 4(e), page eight, that none of the relevant | | 2 | complete authority to license, market, and exploit the covered | |
| 3 | parties is acting as a fiduciary and the plaintiffs are not | | 3 | pictures and all rights therein or to refrain from doing so in | |
| 4 | relying on reps, written or oral, of Paramount or Merrill | | 4 | accordance with sales practices as they determine. | |
| 5 | Lynch, other than that which is contained in the PPM. | | 5 | The indentured, DX 13 attaches Exhibit E, has in it | |
| 6 | And of course, that does not limit the PPM from itself | | 6 | attached as Exhibit E general reps and warrantys of the | |
| 7 | containing a series of disclosures. These are complex | | 7 | transferee. And in big paragraph C, they rep that they have | |
| 8 | structured finance documents, which each of the sophisticated | | 8 | read and understood that the risks as disclosed in the PPM. | |
| 9 | plaintiff investors would know how to read and to follow the | | 9 | And big paragraph E they confirm also that Paramount very | |
| 10 | trail of the documents. | | 10 | importantly was not acting as a fiduciary and was not providing | |
| 11 | Paramount in that same paragraph does not give any | | 11 | any guarantees. | |
| 12 | representations. Paragraph 4(s) states: None of the relevant | | 12 | The PPM is Plaintiff's Exhibit 601. Plaintiffs claim | |
| 13 | parties has made any express or implied representation, among | | 13 | that the PPM in part either set forth certain commitments by | |
| 14 | other things, (s)(iii) that the covered pictures will perform | | 14 | implication, or explicitly, or acted as a coverup. I do not | |
| 15 | in any particular manner or will be distributed in any | | 15 | agree with that reading of the PPM. The PPM never commits to | |
| 16 | particular manner. | | 16 | any particular method for foreign distribution in the future. | |
| 17 | I do find that distribution is a term which sometimes | | 17 | It never commits to maintaining a prior business strategy for | |
| 18 | encompasses financing and sometimes may just be about | | 18 | the future. It doesn't commit to doing any particular kind of | |
| 19 | transferring a picture from here to there. But always it's in | | 19 | marketing. It does commit, if one were to take it that far, to | |
| 20 | connection with money. Distribution of films has never been | | 20 | marketing the picture. But whether or not the pictures would | |
| 21 | disconnected from the financial implications of money. | | 21 | be marketed on 1,000 screens domestically or 1,000 screens in | |
| 22 | Financing can, of course, have a broader definition and may or | | 22 | Germany, is not committed to. And there is no reason to | |
| 23 | may not have anything to do with actual distribution. | | 23 | differentiate between the 1,000 screens domestically and 1,000 | |
| 24 | So financing can be one term, and it may at times | | 24 | screens in Germany. | |
| 25 | incorporate distribution, but it may at other times not. | | 25 | The first page of the PPM states it should not be a | |

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| 1 | basis for any investment decision, and none of Merrill Lynch or | | 1 | their faces, no assurances, these documents are hypothetical | |
| 2 | Paramount have any obligations for forward-looking statements, | | 2 | only. | |
| 3 | and that there is no standing or recourse against Paramount. I | | 3 | In addition, there is the confidentiality agreement | |
| 4 | do find that is a statement which has real meaning and does | | 4 | which the plaintiffs signed. They also contain disclaimers. | |
| 5 | indicate that the plaintiffs here should not have had standing | | 5 | That's DX 95 is an example, which states you acknowledge that | |
| 6 | or recourse against Paramount. | | 6 | none of us or Paramount dot, dot, dot, makes any express or | |
| 7 | There is also large typeface in a bold general | | 7 | implied representation or warranty as to the accuracy or | |
| 8 | disclaimer, but it is on page three. It is not at the end, it | | 8 | completeness of proprietary information. | |
| 9 | is not buried, it's there, it is right in the face of the | | 9 | There is also the term sheet which Marathon at least | |
| 10 | document, that none of Paramount and some others assumes any | | 10 | received, I don't know if there are other versions of it in the | |
| 11 | liability for the adequacy or accuracy of information. | | 11 | record, at DX 96 which also contained a disclaimer by Paramount | |
| 12 | Page six of the PPM refers in the past tense to | | 12 | on page one that they have no responsibility for the | |
| 13 | Paramount has pursued. Not Paramount will pursue. And I'll | | 13 | information on page seven under their responsibilities and | |
| 14 | come back over that in a moment. | | 14 | obligations. That Paramount will market and distribute as it | |
| 15 | Article III is entitled investment considerations. It | | 15 | deems appropriate in the exercise of its business judgment. | |
| 16 | is a number of statements which should have warned investors | | 16 | There is also a general disclaimer in that document on | |
| 17 | that there were no guarantees as to how Paramount would choose | | 17 | page 15. | |
| 18 | to conduct its business. It states on page 31, and we'll come | | 18 | Let me go on now to the general principles of | |
| 19 | back to that, that there can be no assurances that Paramount | | 19 | securities law. I think that we all know and understand that | |
| 20 | will implement the same techniques or achieve similar results | | 20 | we're governed by rule -- well, section 10(b) and Rule 10b-5. | |
| 21 | as it has in the past. | | 21 | And I would point for the elements of a securities claim to the | |
| 22 | Article IV has certain risk factors in referring to | | 22 | Dura case, 544, U.S. 336 at 341 (2005). We all know that Rule | |
| 23 | the uncertainty of success, the uncertainty of production and | | 23 | 10b-5 forbids, among other things, the making of any untrue | |
| 24 | distribution, that the investment is not liquid, that all the | | 24 | statement of material fact or the omission of any material fact | |
| 25 | decisions relating to covered pictures were within Paramount's | | 25 | necessary in order to make the statements made not misleading. | |
| EAU3ALL6 | Decision | Page 1607 | EAU3ALL6 | Decision | Page 1609 |
| 1 | control, that Paramount may modify, amend, cancel or adjust all | | 1 | So to prevail on a claim on a Section 10(b) and Rule | |
| 2 | agreements and policies relating to distribution. That last | | 2 | 10b-5, a plaintiff has to prove by a preponderance of the | |
| 3 | part is on page 36. | | 3 | evidence that defendants have made a material misstatement or | |
| 4 | It refers to the film industry risk, that there are no | | 4 | omission with scienter in connection with a purchase or sale of | |
| 5 | guarantees that the market will remain constant. And that | | 5 | securities, and have reliance or transactional causation and | |
| 6 | distribution is a risk. And that all factors can change. | | 6 | loss causation, along with economic loss. | |
| 7 | In the article V which is the Paramount business | | 7 | The "in connection with" element is not in dispute. | |
| 8 | overview, it is disclosed that Paramount selectively pursues | | 8 | Nor is the fact of economic loss. And loss causation we'll go | |
| 9 | and enters into co-production agreements, and that others may | | 9 | into more in a few moments. | |
| 10 | receive certain distribution rights, and that these may include | | 10 | The securities law as we know from Dura and from the | |
| 11 | worldwide distribution or other territorial rights. | | 11 | Supreme Court are not intended to protect or be a general | |
| 12 | Now, a word on Paramount's sending the general | | 12 | insurance policy against investors to protect from market | |
| 13 | disclaimer language to Merrill Lynch. And that it was comedic | | 13 | losses. That's Dura at 345. | |
| 14 | to suggest they could both sign off on it as well as send in | | 14 | Now let's talk about the misstatements and the | |
| 15 | the general disclaimer language. I actually see it | | 15 | omission. To be liable, as we've said, there has to be a | |
| 16 | differently. Because you can legally disclaim something and | | 16 | material misstatement or omission. I'm going to get to | |
| 17 | still have drafted it. And the drafting of a legal document | | 17 | materiality in a moment. I don't deal with Janus and who the | |
| 18 | which contains a disclaimer is not inconsistent with a | | 18 | maker is. But the statement has to have been false at the time | |
| 19 | disclaimer. It is a legal obligation versus whether or not | | 19 | it was made. And that's the San Leandro Emergency Medical | |
| 20 | factually they touched a particular document. | | 20 | Group, 75 F.3d 801, 812-813 "A statement is false if it is not | |
| 21 | Now, the Monte Carlo, based on the HDS, the historical | | 21 | truthful. Mere apprehension, misunderstanding or mistake of | |
| 22 | data set, and there are various documents to look at in this | | 22 | fact do not suffice to establish falsity." That's at page 813. | |
| 23 | regard. PX 433, PX 898, PX 899, they also contain disclaimers. | | 23 | The Second Circuit has repeatedly stated that plaintiffs have | |
| 24 | Each plaintiff testified to having received the Monte Carlo | | 24 | to do more than simply assert that a statement is false. They | |
| 25 | analysis prepared by Merrill Lynch. Those documents say on | | 25 | have to prove it. They've got to state with specificity why | |

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| 1 | it's false. And after a trial, at least in terms of the | | 1 | assurance" language that Paramount will implement the same | |
| 2 | plaintiffs' affirmative case, they have to prove that by a | | 2 | techniques or achieve similar results in the future. So that | |
| 3 | preponderance of the evidence. | | 3 | clearly states there is no assurance to implement those same | |
| 4 | Now, there are a couple of aspects to falsity. Where | | 4 | techniques. | |
| 5 | a plaintiff asserts falsity of a statement of belief or | | 5 | There is no reason to ignore this paragraph. It can't | |
| 6 | opinion, they have to -- or otherwise asserts falsity -- they | | 6 | just be put to the side. There is no legal or reasonable | |
| 7 | have to assert that it was objectively false as well as that it | | 7 | reason to do that. | |
| 8 | was false at the time it was expressed. | | 8 | And bottom of that page also again references | |
| 9 | Now, statements regarding future projections of | | 9 | Paramount's own extensive worldwide marketing and distribution. | |
| 10 | performance can be actionable if they're worded as guarantees | | 10 | Page 36 references that Paramount has complete | |
| 11 | or supported by specific statements of fact or if the speaker | | 11 | authority to license and market and exploit or refrain from so | |
| 12 | doesn't reasonably or genuinely believe them. That's the IBM | | 12 | doing its films. | |
| 13 | case 163 F.3d 102, 107, the City of Pontiac case, the Water | | 13 | Statement number three is on page 39, which references | |
| 14 | Works case, the 11th Circuit case. Those deal with some of the | | 14 | the historically Paramount has managed its business guided by | |
| 15 | kind of language here. | | 15 | the following strategic objectives. And one of those is | |
| 16 | Here the language of the alleged misstatements, which | | 16 | emphasis on a culture of fiscal caution through continuous | |
| 17 | we're going to go over in a moment, which are statements one | | 17 | budgetary scrutiny and opportunistic risk sharing financing. | |
| 18 | through five, are inactionable as a matter of law if they are | | 18 | That's backward looking. It's true. | |
| 19 | considered to be misstatements. And the cases are those cited | | 19 | Statement four on page 39 which is Paramount | |
| 20 | above as well as there were some additional cases cited by | | 20 | selectively pursues and enters into co-production agreements, | |
| 21 | Mr. Kendall that all go to the same point. | | 21 | studio shared pot deals, split rights deals, and similar | |
| 22 | In addition, plaintiffs have failed to prove by a | | 22 | arrangements depending upon the situation. These agreements | |
| 23 | preponderance of the evidence that the statements at issue were | | 23 | limit Paramount's risk relating to a motion picture's | |
| 24 | false. In fact, I would say not just a failure of proof as to | | 24 | performance. The "selective" is not a word of commitment, of | |
| 25 | falsity. The evidence in the record, the Court finds, | | 25 | quantity. Shared pot deals are various kinds of forms of | |
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| 1 | demonstrates the truth of the statements. And that in the | | 1 | diversification. There were five split rights in the Melrose | |
| 2 | absence of a false statement, of course, no claim can lie. | | 2 | slate. And we'll go into some other additional facts in a | |
| 3 | The five alleged misstatements, and again, I'm going | | 3 | moment. | |
| 4 | to address the omission in a moment, because I do know there is | | 4 | Statement five is on page 40. I think this one may | |
| 5 | a shifting whether it is misstatements or omissions. But as we | | 5 | have been just dropped, it may not be relevant anymore because | |
| 6 | discussed the other evening when I went through them, the | | 6 | it hasn't been raised recently by the plaintiffs. But | |
| 7 | misstatements were statement one, page six of the PPM in | | 7 | nevertheless that's the language "Paramount complements its | |
| 8 | seeking to limit paramount's financial exposure. Paramount has | | 8 | risk mitigation strategy by entering into financial | |
| 9 | pursued a strategy of entering into agreements to share the | | 9 | transactions with third parties that are designed" dot, dot, | |
| 10 | financing of certain films. It is in the past tense. It is | | 10 | dot, "to further reduce capital risks." The tax credit deals, | |
| 11 | retrospective. Springer stated he understood that. There is | | 11 | there is no question that the tax deals did act as a form of | |
| 12 | also statements elsewhere about Paramount using UIP. We'll go | | 12 | risk mitigation. But part of that section also references the | |
| 13 | through these again. | | 13 | selection, the selective entering into of co-production | |
| 14 | Statement two is on page 31 of the PPM. That's the | | 14 | agreements. | |
| 15 | "like other major studios" language. It talks about Paramount | | 15 | And under theatrical distribution on that page, it | |
| 16 | opportunisticly entering into output agreements. There is | | 16 | also references that internationally Paramount generally | |
| 17 | nothing specific beyond it being opportunistic. There is no | | 17 | distributes through UIP, and it informs readers by virtue of | |
| 18 | guarantee that certain things are going to happen. They're | | 18 | that, that there are many instances where it would retain | |
| 19 | going to happen more than on a sporadic basis or even at all. | | 19 | rights. | |
| 20 | "Opportunistic" means an opportunity definitionally has to | | 20 | And also, it states on page 40 that outside the U.S. | |
| 21 | arise which one takes advantage of. And also the fact of | | 21 | Paramount distributes the home video market through PHEI, and | |
| 22 | foreign presales is only one among several different | | 22 | the fact of home video rights outside of being sold in and of | |
| 23 | potentials. | | 23 | itself could lead to impacts on the ability to sell foreign | |
| 24 | The same page, page 31, also discusses leveraging | | 24 | presales. | |
| 25 | Paramount's global distribution infrastructure. The "no | | 25 | There is also language on page eight relating to | |

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| 1 covered pictures. The PPM also clearly states that all | | | 1 so with respect to some of the Melrose slate. | | |
| 2 decisions related to covered pictures remain with Paramount and | | | 2 It is also true that in the past and during the time | | |
| 3 are in Paramount's control. It is on page 36 as we've said. | | | 3 of the Melrose slate, Paramount had used other methods of risk | | |
| 4 And also that it has a right to change its business strategy, | | | 4 mitigation. Making a good film, for instance, with solid stars | | |
| 5 also on page 36. | | | 5 who are known to the box office to be a good draw is a form of | | |
| 6 So together, as I'm going to discuss, these render any | | | 6 risk mitigation. | | |
| 7 reliance unreasonable. I'll talk about that more. As a matter | | | 7 Paramount had used in the past foreign presales as one | | |
| 8 of law, the words that are used, selective, opportunistic, | | | 8 form of risk mitigation. But the record is clear that that was | | |
| 9 fiscal caution, backwards looking, those are not actionable. | | | 9 not for all films, not for all territories. It was highly | | |
| 10 They're puffery, they're vague, they're not promises, they're | | | 10 variable. It was, as the statement in the PPM demonstrates, | | |
| 11 not guarantees. | | | 11 selective and opportunistic. | | |
| 12 I want to turn to the evidence in the record which | | | 12 Thus, all the statements one through five, to the | | |
| 13 indicates a lack of falsity. First of all, there is nothing | | | 13 extent they referred to what was done in the past or imply what | | |
| 14 unusual about the PPM. The PPM doesn't do anything | | | 14 was done in the past, are literally true. | | |
| 15 particularly unusual. Mr. Maslansky testified to that. He | | | 15 Now, we heard counsel argue that some of the former | | |
| 16 testified that he was hired to look at the PPM, and to | | | 16 misstatements, numbers one, three and four, may be true in the | | |
| 17 determine whether there was anything unusual about it. He | | | 17 past but they constitute an actionable omission, and that was | | |
| 18 didn't see anything unusual. | | | 18 what Mr. Charron posited today. And I'm going to address why I | | |
| 19 Now, if the PPM had bound Paramount forevermore to do | | | 19 don't think that, even if one takes those as omissions, they | | |
| 20 a particular kind of co-financing in the foreign jurisdiction, | | | 20 are actionable. So either way, those statements the Court | | |
| 21 that would have been unusual. That would have been a kind of | | | 21 finds are not actionable. | | |
| 22 binding. That would have been a change. How do we know that? | | | 22 To the extent that plaintiffs assume they could count | | |
| 23 We know that from the record evidence which shows variability | | | 23 on a continuation of one through five, statements one through | | |
| 24 year to year. The very variability of each of the co-financing | | | 24 five in the future, they needed some language indicating a | | |
| 25 types indicates that Paramount would have been changing its | | | 25 commitment or something that was predictive of the future. | | |
| EAU3ALL6 | Decision | Page 1615 | EAU3ALL6 | Decision | Page 1617 |
| 1 business to have bound itself to one or the other type or to | | | 1 There is no such language. In fact, there is the opposite. | | |
| 2 any type. | | | 2 This confuses, I believe, risk mitigation with risk | | |
| 3 The trial record does not support Paramount ever | | | 3 elimination. And there is no language that ever suggests risk | | |
| 4 having made a commitment in the past to do or refrain from | | | 4 elimination. Paramount never claimed to have eliminated risk. | | |
| 5 doing a particular act for purposes of risk mitigation. That | | | 5 If they had, they would have had the secret sauce, and I | | |
| 6 Paramount, as a reasonable company, engaged in risk mitigation, | | | 6 presume they would have sold it to the market. Because risk | | |
| 7 that simply states the obvious. It doesn't bind Paramount to a | | | 7 elimination would be something that every company would sorely | | |
| 8 particular version of risk mitigation, X agreements, for | | | 8 and dearly love to have. | | |
| 9 instance, for X territories, for X amount of money, even within | | | 9 I do find by a preponderance of the evidence that they | | |
| 10 a range that is binding it. | | | 10 did not make a commitment to any type of particular action to | | |
| 11 Now, the PPM, to have made a specific commitment with | | | 11 the future. | | |
| 12 respect to a particular type of risk mitigation or a particular | | | 12 Persuasive in this regard is also the fact that there | | |
| 13 type in quantum of co-financing would have required certain | | | 13 is no evidence that plaintiffs ever sought a commitment as to a | | |
| 14 things. And that would have required a commitment or a | | | 14 particular form or number of foreign presales or indeed a | | |
| 15 guarantee, which is not there. | | | 15 particular form of risk mitigation. Instead, plaintiffs sought | | |
| 16 Now, all of the statements which are referenced as | | | 16 assurances that business would continue as usual. And so it | | |
| 17 I've just set them out, statements one through five, those | | | 17 seems by the evidence, and the Court so finds, that it did. | | |
| 18 which refer to the past were true. In fact, I believe that is | | | 18 Paramount continued to make and market movies. It did so | | |
| 19 plaintiffs' case, which is that those statements of past | | | 19 according to its best business judgment at the time. That's | | |
| 20 practice are true. That co-financing was used as a method of | | | 20 the evidence in the record. That's what they committed to do. | | |
| 21 risk mitigation. That is, shared risk with others through a | | | 21 That's what they did. There was no fundamental change in | | |
| 22 co-financing arrangement. | | | 22 business strategy that would rise to the level of not business | | |
| 23 But there are many forms of risk mitigation, as I've | | | 23 as usual. | | |
| 24 said, and they're highly variable. It is true that Paramount | | | 24 No plaintiff said they had a guarantee. Indeed, they | | |
| 25 did opportunistically enter into territorial sales, and it did | | | 25 testified to the opposite. And none had sought such. | | |

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| <p>EAU3ALL6 Decision Page 1618</p> <p>1 To the extent that plaintiffs are alleging and have 2 asserted that Paramount failed to engage in any reasonable risk 3 mitigation as they had in the past, that's also disproven by 4 the record. Indeed, the Melrose LLC, as Mr. Springer 5 testified, was itself a form of risk mitigation. 6 Melrose LLC raised over \$200 million as a form of 7 co-financing. So as a matter of fact, Paramount had engaged in 8 significant risk mitigation and significant co-financing, just 9 by virtue of the Melrose slate. 10 DX 252 shows Melrose financing of 232. Other 11 co-financing in the amount of 274 -- these are in millions of 12 dollars -- for a total of over \$500 million. This was a 13 significant risk mitigation. Whether plaintiffs like the fact 14 that they were part of the risk mitigation is a separate issue. 15 It doesn't make the fact of it untruthful. 16 Robert Friedman, the person at Paramount who was in 17 part responsible for foreign presales testified at his 18 deposition, which has been designated, that he does not recall 19 any particular change in territorial presales. Sherry Lansing 20 of Paramount, formerly of Paramount, testified similarly to no 21 change in practice. 22 PX 324, which are the board minutes. The Court does 23 not see any decision coming out of that, apart from discussion 24 of risk mitigation, which I hope would be discussed at the 25 board level. The Court does not find any indication that there</p> | <p>EAUFALL7 Decision Page 1620</p> <p>1 THE COURT: That does not, of course, mean that 2 Paramount continued to do everything in exactly the same way it 3 had done in the past. One would hope that it would always 4 attempt to improve on its business and it would undertake the 5 acts which it believed in its best business judgment and as a 6 rational economic actor would achieve the highest 7 profitability. That, however, does not mean that if those 8 business judgments fail that they have engaged in fraud. 9 Indeed, one would assume that Paramount itself wanted and all 10 indications are that they did want, according to the designated 11 testimony, for these films to succeed in the biggest way 12 possible. They were just disappointed in that hope. 13 So in addition to a lack of commitment to a particular 14 level of risk mitigation, co-financing and foreign presales, 15 the PPM and other documents also provide no basis for 16 assurance. Nowhere in the HDS or in any other document, in no 17 testimony by any witness is there evidence that Paramount ever 18 stated that it was committed to or would engage in any 19 particular level of foreign presales with respect to particular 20 films or with respect to particular territories. 21 In addition to the fact that the PPM is generally 22 backward-looking there are a number of places in the PPM that 23 specifically caution the reader not to rely on anything 24 attributed to Paramount and Merrill Lynch. This has 25 implications for reasonable reliance that I'll get to in a</p> |
| <p>EAU3ALL6 Decision Page 1619</p> <p>1 was a change of practice in that document. 2 Similarly, David Friedman testified in a similar 3 manner. He also testified that Paramount would look for 4 opportunities. Tobey testified similarly. Badagliacca also 5 testified to no change in a strategy of selling foreign rights. 6 Ms. Magid also testified at her deposition where she was 7 designated as a 30(b)(6) that she was not aware of any change 8 in Paramount's way of conducting business in the relevant time 9 frame. 10 (Continued on next page) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> | <p>EAUFALL7 Decision Page 1621</p> <p>1 moment. But let's talk about the HDS and whether the HDS, 2 historical data set, when provided as a basis to evaluate how 3 slates had done in the past can provide an implicit commitment 4 for the future which is how it is being used. 5 The HDS are PX 899 and they were also used as the 6 basis for the Monte Carlo analyses which were run by Merrill 7 Lynch and which certain investors utilized for some of their 8 own modeling. I don't believe that these assist the plaintiffs 9 in making out a securities fraud claim. If Paramount had a 10 formula to replicate the average of historically positive 11 results year after year undoubtedly they would do so as a 12 rational business and they had not been shown in this trial to 13 have acted other than rationally. Paramount did not provide 14 any guarantees with respect to the HDS and indeed accompanied 15 the HDS with a disclaimer. Well, it accompanied the Monte 16 Carlos based on the HDS with a disclaimer. 17 It is up to the plaintiffs as investors to determine 18 how much weight to place on past performance of demonstrably 19 different films. It is acknowledged and has been discussed 20 that each film has its own cast, it has its own appeal or lack 21 of appeal. And therefore it cannot be assumed that a group of 22 films from the past is necessarily predictive of anything in 23 the future. As a matter of fact, the evidence is that 24 co-financing, the numbers on the HDS included both foreign and 25 domestic in a combined number and it was not broken out by</p> |

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| 1 | particular type and no plaintiff ever sought to determine that | | 1 | of foreign presales or committing that he would engage in the | |
| 2 | a specific amount of co-financing was attributable to specific | | 2 | same number that you could obtain by running an average of the | |
| 3 | foreign presales for particular territories. The record | | 3 | HDS. There's nothing even close to that in PX 331. There's no | |
| 4 | revealed instead there were several different types of | | 4 | Paramount witness who's testified at deposition in the | |
| 5 | co-financing including split right deals, foreign presales and | | 5 | designations or here at trial that that statement by McGrath | |
| 6 | others. | | 6 | either directly or by hearing about it from Merrill Lynch, even | |
| 7 | The footnotes to the HDS that were provided which are | | 7 | if that would be, I don't have to reach whether or not that's | |
| 8 | at PX 864 make it clear that not all films have foreign | | 8 | something that could form the basis for security fraud, but no | |
| 9 | presales and that the amounts of any co-financing for films | | 9 | witness said that they assumed that that meant a particular | |
| 10 | varied considerably by percentage and type. The Court also | | 10 | level of foreign presales were going to be maintained | |
| 11 | would refer to the demonstratives that were shown today, but | | 11 | consistent with the HDS. And it's unreasonable to think that | |
| 12 | particularly to the underlying documents to those | | 12 | it would. | |
| 13 | demonstratives; those are demonstrative Court Exhibits 4 | | 13 | The evidence at trial was that there had not in fact | |
| 14 | through 10, but the underlying documents at PX 850, PX 851, PX | | 14 | been a material shift in strategy. The strategy provided to | |
| 15 | 838 and PX 864. Those documents together show a high degree of | | 15 | the plaintiff as set forth in the PPM showed a multifaceted | |
| 16 | variability of type and amount of the various kinds of | | 16 | strategy, that there were split rights, that split rights could | |
| 17 | co-financing. They show no territorial sales in 1998, only a | | 17 | include all kinds of things, that there were multiple ways of | |
| 18 | few in 1999, 2000 has no shared pot, a few territorial. The | | 18 | co-financing and that it varied all the time. So the world and | |
| 19 | Melrose slate 2004 is ahead or at least not particularly | | 19 | the investors in particular were on notice that there could be | |
| 20 | different from 1998. 2006 does in fact have some foreign | | 20 | changes just by virtue of results. | |
| 21 | presales for the Melrose slate. And then again Court Exhibit | | 21 | The PPM itself on page 36, as I've already described, | |
| 22 | 11, relying on the documents stated on that demonstrative, show | | 22 | refers to Paramount's right to change its business strategy. | |
| 23 | film-by-film the Melrose slate and there was some different | | 23 | Whether or not Merrill Lynch itself took comfort in certain | |
| 24 | types of risk mitigation or co-financing in each category. | | 24 | communications it had with Paramount is really irrelevant to | |
| 25 | So let's turn to the use of the HDS. The HDS includes | | 25 | whether investors, here plaintiffs, as a legal matter should or | |
| EAUFALL7 | Decision | Page 1623 | EAUFALL7 | Decision | Page 1625 |
| 1 | I think all kinds of co-financing and the Monte Carlo in | | 1 | could have taken comfort in certain statements that were made | |
| 2 | particular. The Monte Carlo analysis is at PX 898 and also PX | | 2 | and disclaimed in the PPM. But let's take a look and just go | |
| 3 | I believe 433. It has a general disclaimer in large font on | | 3 | through some of the witnesses for a moment. | |
| 4 | the front, as we said, that Paramount does not assume liability | | 4 | There is Mr. Burnaman of Newstar. He stated at page | |
| 5 | for adequacy or accuracy. Page 3 talks about results, actual | | 5 | 975, no guarantees. He talked about no commitments at pages | |
| 6 | results may vary and that in fact if you look at the Monte | | 6 | 1017 through 1019. He stated that he was on a call with | |
| 7 | Carlo you can see that co-financing varied year to year and in | | 7 | Paramount where he was told about a management change and that | |
| 8 | fact, when you look at the fact that there were 10,000 | | 8 | what he recalled most was that the management change was not a | |
| 9 | variations it ran variability and co-financing. | | 9 | result of malfeasance and that also Paramount intended to | |
| 10 | Let me turn to some of the other evidence of no | | 10 | continue business as usual but it's unclear to this Court how | |
| 11 | falsity. Plaintiffs introduced Plaintiff's 330, an article | | 11 | this statement could be taken as any sort of commitment to any | |
| 12 | that the Wall Street Journal ran in March 2004 entitled | | 12 | sort of rational business that it would never change any | |
| 13 | "Paramount Has a New Mantra - Taking Risks is Healthy. The | | 13 | practice and that it would commit thereby to entering into the | |
| 14 | Court takes this article just for the fact that the article was | | 14 | same types of co-financing presale arrangements as it had in | |
| 15 | published, not for the truth of it. Now, Mr. Hoffman for | | 15 | the past, presumably on favorable terms because presumably the | |
| 16 | Merrill Lynch did say he spoke with investors about that | | 16 | plaintiffs are not asking that Paramount enter into | |
| 17 | article and following that article Mr. McGrath from Paramount | | 17 | co-financing relationships through foreign presales that were | |
| 18 | told Merrill Lynch that there had not been, quote, "a | | 18 | less favorable. But of course that could have occurred too. | |
| 19 | fundamental shift in Paramount's production strategy" and the | | 19 | They could have been less favorable. Because of course | |
| 20 | other statements he made in PX 331. This language, however, | | 20 | entering into foreign presale agreements for the sake of it is | |
| 21 | does not provide any specific guarantee regarding any specific | | 21 | not what they seek. | |
| 22 | actions. It's really quite broad, quite general. Nothing can | | 22 | Their claim is premised on the assumption that | |
| 23 | be based on that. | | 23 | Paramount could enter into a similar number of agreements in | |
| 24 | There's no specific evidence that McGrath himself was | | 24 | the same territory on the same or better terms, at least in | |
| 25 | intending to make a statement about foreign presales or levels | | 25 | terms of the HDS average. Otherwise the unfavorable terms of a | |

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| 1 | foreign presale wouldn't help. | | 1 | also DX 133. He also testified at page 590 that he did not | |
| 2 | Now, Newstar's Burnaman also testified that he was not | | 2 | receive guarantees from Paramount and Maslansky, who | |
| 3 | contending there was any fraud in the HDS, that is, that the | | 3 | represented Allianz along with Munich Re, testified that | |
| 4 | numbers there were untrue. | | 4 | Paramount had not committed to selling a certain number of | |
| 5 | The plaintiff spent a fair amount of time on Moody's, | | 5 | foreign presales at page 435 and that there was no commitment | |
| 6 | the rating agents. They're irrelevant, frankly, to the Court. | | 6 | in the PPM or the subscription agreement by Paramount and | |
| 7 | The communications do not help the fraud claim. The fact that | | 7 | that's at page 440. | |
| 8 | the reasonable, these sophisticated investors would go to | | 8 | And here's some additional evidence. PX 116, the | |
| 9 | Moody's for purposes of materiality the Court does not find to | | 9 | investment price invoice, shows territorial presales for the | |
| 10 | be persuasive. Moody's asked for all kinds of information and | | 10 | four films released as of mid-July and no co-financing for two | |
| 11 | it cannot be that every data point that Moody's ever receives | | 11 | of the films. That's a disclosure of actual business | |
| 12 | is considered itself material by virtue of having been received | | 12 | practices. PX 154 shows that Munich Re and other investors had | |
| 13 | by Moody's and I'll come back to that. But there's no | | 13 | received information on the levels of co-financing | |
| 14 | evidence, frankly, that anyone at Paramount intentionally and | | 14 | pre-investment. | |
| 15 | knowingly defrauded Moody's with the intention of having | | 15 | 252, DX 252, in July Munich Re received information | |
| 16 | Moody's act as a proxy to defraud the investors. | | 16 | that levels of co-financing were running behind. And also 162, | |
| 17 | The Court also refers to DX 35 and DX 49 received by | | 17 | DX 162. | |
| 18 | Newstar and other investors pre-investment showing that | | 18 | PX 612 reveals that Newstar itself knew that none of | |
| 19 | co-financings for the films on the Melrose slate were running | | 19 | the alleged statements were false or binding promises. In the | |
| 20 | significantly behind historical averages. This clearly has | | 20 | memo there that was prepared by Dechert it notes that Paramount | |
| 21 | implications for reasonable reliance which I'm going to get to | | 21 | has, quote, "significant discretion and authority with respect | |
| 22 | in a moment, but in addition it disproves at the time that the | | 22 | to the revenue stream," end quote. This was not qualified with | |
| 23 | alleged misstatements were made in the PPM that they were known | | 23 | anything like "something along the lines of" but they are | |
| 24 | to or even believed to be false because the very business | | 24 | committed to entering into certain numbers and types of | |
| 25 | practices at issue were either being implemented or not. | | 25 | co-financing deals. The Dechert memo also notes there is no | |
| EAUFALL7 | Decision | Page 1627 | EAUFALL7 | Decision | Page 1629 |
| 1 | Witnesses have repeatedly testified that they ignored this | | 1 | covenant in the documentation that requires Paramount to | |
| 2 | information other than for the purpose of obtaining the names | | 2 | keeping skin in the game. Interestingly, the way that this | |
| 3 | of films on the slate because they read the disclaimer on the | | 3 | reads is that the selling of rights was more of a concern than | |
| 4 | front which indicated that the numbers were not final. | | 4 | a retention of rights and that there was a concern by Dechert | |
| 5 | Well, of course number could not be final until all | | 5 | that by keeping skin in the game by retaining rights, that | |
| 6 | revenues associated with the Melrose slate had been obtained | | 6 | would be preferable. In either event, there's nothing which | |
| 7 | years in the future and all production and other costs had been | | 7 | calls out foreign presales or co-financing as any kind of issue | |
| 8 | incurred. Until then the numbers associated with costs and | | 8 | that should be specifically mentioned. | |
| 9 | with revenues and ultimately with profitability and return | | 9 | PX 613, the Newstar credit analysis memo, recites | |
| 10 | could and would change. That's just a fact of how businesses | | 10 | risks. The fourth risk is that Melrose has no input into the | |
| 11 | operate. The Court does not find credible that all of these | | 11 | marketing and distribution of covered pictures. There's also | |
| 12 | highly sophisticated businessmen having information as to the | | 12 | PX 389 where Munich Re participated in a meeting in which it | |
| 13 | co-financing levels at their disposal pre-investment would have | | 13 | understood that Paramount retained all worldwide or domestic | |
| 14 | ignored it if they truly cared about it. It was simply, as to | | 14 | rights it was differentiated in 16 films. Maslansky, who | |
| 15 | be further discussed in a moment, not material to them. | | 15 | represented Munich Re as well as Allianz, used speculation to | |
| 16 | Investors should have been tracking any information | | 16 | back out what he believed were foreign presale numbers from the | |
| 17 | that was of importance. In all events, the updates to the | | 17 | co-financing. But it's notable he didn't ask for additional | |
| 18 | Melrose slate in these documents indicate that Paramount was | | 18 | information in this regard. He testified he believed he had | |
| 19 | not hiding its business practices from the plaintiffs. It was | | 19 | sufficient information to perform the analyses which his | |
| 20 | disclosing them. The statements could not be false as a | | 20 | clients requested that he performed. He also testified that DX | |
| 21 | result. | | 21 | 203 didn't raise any concerns. | |
| 22 | Allianz's Flynn received information on the investment | | 22 | In DX 212 and DX 209, which he received, they showed | |
| 23 | showing a high variable in co-financing -- that's DX 133 -- | | 23 | both of them a possible loss investment. Maslansky testified, | |
| 24 | that the film slate was over budget. That's also DX 133. And | | 24 | as I've said, that there was never any commitment and that's in | |
| 25 | that Paramount generally retained worldwide rights. That's | | 25 | DX 204 that presales were running at a rate that was 50 percent | |

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| 1 | lower than historically. | | 1 | had already decided not to engage in the same level of foreign | |
| 2 | I do want to mention Court Exhibit 3 which is the | | 2 | presales as it had in the past and that they say this is | |
| 3 | plaintiff's demonstrative, the document which they say that the | | 3 | demonstrated through two documents. The first is the retained | |
| 4 | proof is in the pudding -- that's my words and not | | 4 | foreign rights PowerPoint and the second is the June 2003 | |
| 5 | plaintiffs -- and that there were no deals done post PPM. But | | 5 | Lakeshore memo. The second is at PX 218. But there is no one | |
| 6 | there's a lack of evidence and indeed I should say there's | | 6 | who makes the retain more foreign rights PowerPoint into a | |
| 7 | affirmative evidence in the record through the deposition | | 7 | smoking gun or to indicate that it reveals a fraud. There's no | |
| 8 | designations that there were deals being pursued | | 8 | connection to following action, to action which followed which | |
| 9 | opportunisticly. I have no information that suggested that | | 9 | was a decision made at that point. There's no causation that's | |
| 10 | is not true. The fact that nothing happened does not mean that | | 10 | tied to that statement and any following business practice. It | |
| 11 | nothing was tried. That's also consistent with what Ms. Magid | | 11 | doesn't say in that document that Paramount will not engage in | |
| 12 | had testified to. | | 12 | any foreign presales. It does not state that it will not | |
| 13 | Now, Maslansky also testified that he never asked for | | 13 | engage in any co-financing. It simply says they're going to | |
| 14 | a commitment to operate in the same manner. He wasn't sure | | 14 | retain more rights. | |
| 15 | that he'd ever asked for such a commitment. Hohmann testified | | 15 | That's well within their business judgment to decide | |
| 16 | he did not receive any specific reps regarding risk mitigation | | 16 | which rights they want to retain, how many they want to retain. | |
| 17 | plans by Paramount and that's consistent with Maslansky. The | | 17 | From year-to-year in the past they had retained more rights in | |
| 18 | same is true for Allianz's Flynn, for Newstar's Burnaman, that | | 18 | some years and not retained more rights in other years and | |
| 19 | they were not made promises or guarantees. | | 19 | that's the variability I discussed before. | |
| 20 | Springer never asked for specific assurance regarding | | 20 | In the June 2003 Lakeshore memo it does not suggest | |
| 21 | foreign presales. That's at page 1252. He didn't consider | | 21 | that Paramount was dropping its risk mitigation. Lakeshore was | |
| 22 | getting a rep. That's 1272. At 1254 he said he understood | | 22 | a specific transaction, and, really, it does not, you can't | |
| 23 | that there was no assurance that Paramount wouldn't implement | | 23 | take the PX 218 and transpose it on to the entire Melrose slate | |
| 24 | the same co-financing techniques. | | 24 | and suggest that it is a demonstration that all foreign | |
| 25 | The Court also would refer to PX 850, 851, 838 and | | 25 | presales stopped. | |
| EAUFALL7 | Decision | Page 1631 | EAUFALL7 | Decision | Page 1633 |
| 1 | 864. And I would mention PX 343. I would say that PX 343, | | 1 | Now, as a matter of law, an admission in any event is | |
| 2 | there's nothing -- going back to the testimony there's nothing | | 2 | not actionable even if there are any -- unless a defendant is | |
| 3 | that allows the Court to interpret it as the plaintiffs would | | 3 | under a duty to disclose certain information or if the | |
| 4 | have. I don't think it would, frankly, change the result given | | 4 | information is peculiarly within its possession. Now, here | |
| 5 | the weight of the evidence and it certainly I don't think does | | 5 | there is no duty to disclose and as I've said the information | |
| 6 | anything in terms of falsity or scienter given the weight of | | 6 | on all of the facts about foreign presales was disclosed to the | |
| 7 | the evidence. | | 7 | plaintiffs themselves including the slow number of foreign | |
| 8 | Now, in terms of omission, plaintiffs also allege that | | 8 | presales that was occurring with respect to the Melrose slate. | |
| 9 | if they didn't make, that in terms of the PPM that there are | | 9 | So it was not peculiarly within their, only their possession. | |
| 10 | actionable omissions that the PPM makes statements and | | 10 | Now, under the Chiarella case, 445, U.S. 222, that's a | |
| 11 | therefore what is omitted, which is a change of business | | 11 | case which talks about typically a duty to disclose arises when | |
| 12 | strategy, a determined change of business strategy, leads to a | | 12 | you're a fiduciary. Notably, most of the communications here | |
| 13 | deception. But the law is clear in securities fraud cases that | | 13 | are with Merrill Lynch, but plaintiffs don't claim that Merrill | |
| 14 | you have to set forth in your complaint what it is you're | | 14 | Lynch ever misled them in any way. The facts adduced by the | |
| 15 | seeking and it is true that you can conform evidence to the | | 15 | defendant at trial make it clear that as of April 2004 Merrill | |
| 16 | proof at trial. But in securities fraud cases you're really | | 16 | Lynch had been told that Paramount intended to maintain | |
| 17 | supposed to do something that's different under Rule 9b. | | 17 | distribution rights for more of its films than it had in the | |
| 18 | You're supposed to put down with specificity the actual | | 18 | past. It had that information. The facts just don't support, | |
| 19 | statements and omissions and there's lots of law on that and | | 19 | also do not support a duty to disclose. | |
| 20 | for that reason alone the Court could refuse and if I were | | 20 | There's no evidence that Paramount had any kind of | |
| 21 | charging a jury I would refuse to charge the omissions. | | 21 | fiduciary relationship, it had no special relationship with | |
| 22 | Nevertheless, I have looked at them here and I don't find that | | 22 | plaintiff as a matter of law. In fact, the subscription | |
| 23 | there are any omissions, any actionable omissions. | | 23 | agreement and the PPM disclaim disclosure obligations and those | |
| 24 | Plaintiffs claim that Paramount omitted to disclose, | | 24 | disclaimers are binding and there was also a disclaimer of any | |
| 25 | as I said, that at the time of the securities offering that it | | 25 | fiduciary obligation. | |

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| 1 | The alleged omission here also was not an omission. | | 1 | documents that they themselves signed. They knew how to get | |
| 2 | It's in effect an allegation of fraud by hindsight. Plaintiffs | | 2 | them, they knew how to give them and they could have asked for | |
| 3 | now wish they had had more information. | | 3 | them here. Now, it's not the cake and eat it too issue because | |
| 4 | But the Paramount witnesses testified there was no | | 4 | if they asked for a rep and they didn't get it they would have | |
| 5 | change of business strategy in 2004. Lansing testified to | | 5 | that information. They could then factor that into whether or | |
| 6 | that, Tobey testified to that, Friedman testified to that, | | 6 | not they wanted to invest. If without a requested rep they | |
| 7 | Magid testified to that, and the PPM itself contained a | | 7 | determined they were unwilling to proceed, that was within | |
| 8 | disclosure that its parent and itself had publicly came out in | | 8 | their control. And that's the purpose of asking for a rep. | |
| 9 | favor of additional risk. | | 9 | Not so that they -- there's nothing that bound them to | |
| 10 | In addition, the plaintiffs also received the | | 10 | proceed with this transaction. They weren't required, there | |
| 11 | investment invoices at what I believe is PX 116 or it's DX 116. | | 11 | were other places to put their money at that time. So the | |
| 12 | That also indicates information which proves that there was no | | 12 | Court does look at the plaintiffs in terms of as investors, as | |
| 13 | omission because the very information sought was disclosed. | | 13 | reasonable people and what they saw as material the Court does | |
| 14 | So let's turn to materiality. A material statement or | | 14 | view as indicative among other factors as what's material. | |
| 15 | omission is material if there's a substantial likelihood that a | | 15 | They saw the disclaimers but did not drill down on how those | |
| 16 | reasonable investor would consider the fact misstated or | | 16 | disclaimers applied to foreign presales. That indicates to the | |
| 17 | omitted important in connection with a contemplated securities | | 17 | Court that foreign presales were not of particular importance | |
| 18 | transaction. That's the Basic case, 485 U.S. 224; the | | 18 | to them. Their failure to drill down on the information they | |
| 19 | Castellano Young & Rubicam case, 257 F.3d 171; the Azrieli v. | | 19 | received undercuts a finding of materiality. | |
| 20 | Cohen Law Offices case at 21 F.3d 512. | | 20 | The Court also refers to PX 44, DX 76 where there's no | |
| 21 | Put another way, a misstatement or omission is | | 21 | focus on foreign presales at all. None of the plaintiffs | |
| 22 | material when there's a substantial likelihood that the | | 22 | sought to drill down. There's a fair amount of evidence | |
| 23 | disclosure of the omitted fact would have been viewed by the | | 23 | supportive of lack of materiality of foreign presales in the | |
| 24 | reasonable investor as having significantly altered the total | | 24 | record or even really of foreign co-financing more generally. | |
| 25 | mix of information available and of course that's the basic | | 25 | Newstar's Dechert memo, again, at PX 613 talks about | |
| EAUFALL7 | Decision | Page 1635 | EAUFALL7 | Decision | Page 1637 |
| 1 | case. Materiality is defined by an objective standard based | | 1 | the three drivers that they were looking at as being production | |
| 2 | upon the significance that an omitted fact or misrepresentation | | 2 | costs, lifetime revenues and P&A. Those general categories no | |
| 3 | would have to a reasonable investor. And when contingent or | | 3 | doubt as general categories were important, but foreign | |
| 4 | speculative future events are at issue the materiality of those | | 4 | presales was not pulled out with any kind of specificity. | |
| 5 | events depends on balancing of both the indicated probability | | 5 | Newstar's Burnaman did not have a particular level of foreign | |
| 6 | that the event will occur and the anticipated magnitude of the | | 6 | presales in mind, just risk mitigation generally. That | |
| 7 | event in light of the totality of company activity. That's the | | 7 | undercuts the materiality of foreign presales. | |
| 8 | Castellano case at 257 F.3d at 179. | | 8 | DX 39, plaintiff saw presales were running behind. If | |
| 9 | And, of course, touting good risk controls has been | | 9 | it was material they should have asked followup questions or | |
| 10 | found to be inactionable puffery. That's the EGA and Local 134 | | 10 | even noted it in documentation. They did not. | |
| 11 | IBEW case 553 F.3d at 206. Also the Ramback case at 355 F.3d | | 11 | DX 76, the investment committee minutes for Newstar. | |
| 12 | at 174. | | 12 | It's a synthesis, as we heard, of the major work and thinking | |
| 13 | Materiality is prospective, not retrospective and | | 13 | leading to the investment decision, but there's nothing about | |
| 14 | materiality is not determined by a single event. Materiality | | 14 | foreign presales or co-financing, foreign co-financing in | |
| 15 | is determined as of the date plaintiff entered into the | | 15 | there. It's simply an input into other numbers. | |
| 16 | securities transaction at issue. See also in addition to the | | 16 | PX 655, Munich Re makes a business recommendation and | |
| 17 | other cases the Radiation Dynamics case, 464 F.2d 876 at 890, | | 17 | in its memo does not mention foreign presales or any particular | |
| 18 | 891. | | 18 | form of risk mitigation relied upon. Indeed, they testified | |
| 19 | The evidence does not support that business practices | | 19 | they never asked for any kind of breakdown. That's 1107. | |
| 20 | with respect to foreign presales was material to plaintiffs. | | 20 | Marathon's Springer testified that a change in risk | |
| 21 | More affirmatively, the Court finds it was not material. | | 21 | mitigation practices would have been material but this | |
| 22 | First, plaintiffs were sophisticated investors. If they wanted | | 22 | contrasts to the fact he never asked for a rep on that, never | |
| 23 | a rep they had to get a rep. Indeed, one of the investors, | | 23 | stated that a particular risk mitigation, e.g., foreign | |
| 24 | Mr. Burnaman himself, had testified on reps and warranties and | | 24 | presales was material. PX 521, PX 505 and PX 524 and related | |
| 25 | there were reps and warranties involved in some of the | | 25 | testimony to those documents indicate that none of the | |

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| 1 | plaintiffs had asked for foreign presale breakouts for the HDS | | 1 | seems to be that the theory is it was the company generally but | |
| 2 | or the Melrose slate. They never pressed it and that undercuts | | 2 | I don't know who was around that table with a smoky room | |
| 3 | materiality. | | 3 | intending to defraud and what their possible motivation was. | |
| 4 | Flynn at page 606 says he doesn't recall asking for a | | 4 | Because you would think that if Paramount was doing the first | |
| 5 | breakdown. Page 511, he did not model it. Marathon asked for | | 5 | slate deal ever with Merrill Lynch that they might want to do | |
| 6 | some additional information, but once the information was | | 6 | another one rather than just cut off their nose to spite their | |
| 7 | negotiated there hadn't been in the beginning and then there | | 7 | face at the very first one by defrauding people at the outset. | |
| 8 | wasn't by the time they were done with negotiations any | | 8 | And certainly there's I think no allegation, there couldn't be, | |
| 9 | reference to foreign presales. | | 9 | that Paramount sought to tank its own films. It clearly wanted | |
| 10 | Maslansky did not stress the model for foreign | | 10 | success. There's no indication that it did not want | |
| 11 | presales. All of those undercut materiality. PX 521 also sets | | 11 | plaintiffs' investment to succeed. Those undercut scienter. | |
| 12 | forth information that Marathon was seeking, as I've said, but | | 12 | It would seem that if Paramount decided to retain | |
| 13 | there was never any followup and importantly, Springer did ask | | 13 | foreign presales and the Melrose slate had done well that | |
| 14 | for additional runs by Merrill Lynch of the modeling, but never | | 14 | plaintiffs would have benefited greatly. In that regard, | |
| 15 | asked for a run on foreign presales. In short, if foreign | | 15 | Paramount intended to make a win-win situation, to the extent | |
| 16 | presales were important to plaintiffs at the time that they | | 16 | that it retained foreign rights it intended to have a win-win | |
| 17 | entered into the Melrose transaction versus hindsight, they | | 17 | situation. It turned out to be lose-lose, but that's in | |
| 18 | have not demonstrated that. | | 18 | hindsight. That's a failed business judgment, not fraud, and | |
| 19 | Moody's, I should state for a moment -- let me just | | 19 | the business judgment traces back film-by-film, it doesn't | |
| 20 | pause on Moody's. Moody's cannot be used as a definition for | | 20 | trace back to an entire slate. Scienter, really, here is not | |
| 21 | materiality, not at least in the way the Moody's information | | 21 | shown. | |
| 22 | was put forward. There's no law which says that Moody's or any | | 22 | Plaintiffs argue that scienter is apparent in the | |
| 23 | of the rating agencies, that everything they asked for is ipso | | 23 | actual numbers and the failure to acknowledge the truth, but I | |
| 24 | facto material. They asked for a lot of data, and not every | | 24 | view this evidence differently. I don't find any evidence from | |
| 25 | piece of which is assumed to be material. | | 25 | any Paramount witness whose testimony was designated or | |
| EAUFALL7 | Decision | Page 1639 | EAUFALL7 | Decision | Page 1641 |
| 1 | Let's turn to scienter. As we all know, to establish | | 1 | Ms. Magid who testified at trial that could conceivably lead to | |
| 2 | liability under Section 10b and Rule 10b-5 a private plaintiff | | 2 | an inference that Paramount planned to defraud plaintiffs by | |
| 3 | has to prove that a defendant acted with scienter. And | | 3 | not telling them this one very specific fact which Paramount | |
| 4 | scienter is a very serious and rigorous standard. Scienter is | | 4 | had decided to retain more foreign rights and not engage in | |
| 5 | the state of mind of somebody trying to defraud another, trying | | 5 | foreign presales. The evidence I find is to the contrary. The | |
| 6 | intentionally to mislead another in connection with a | | 6 | evidence supports Paramount wanting the films in the slate to | |
| 7 | securities purchase or sale. It's the mental state embracing | | 7 | do well and there's testimony in the designated depositions to | |
| 8 | the intent to deceive, to manipulate or defraud. It's the | | 8 | that in that regard. There was no view that the films were | |
| 9 | Tellabs case, 551 U.S. 308, which quotes, of course, the Ernst | | 9 | known before they even were released or the first four at | |
| 10 | & Young case, Ernst at that time case, 525 U.S. 185. The City | | 10 | release that they were losers and in fact Mean Girls did quite | |
| 11 | of Pontiac case has got a more recent discussion of that of | | 11 | well, relatively speaking. There was hope that they would all | |
| 12 | scienter by the Second Circuit at 752 F.3d at 185 to 86. There | | 12 | do well. As Friedman said in his deposition, Paramount could | |
| 13 | disclosures of the very information sought or alleged to be | | 13 | experience the upside as well as the downside with various | |
| 14 | misleading undercuts scienter. | | 14 | kinds of presales. So Paramount would have, but also by | |
| 15 | The Court has to consider all of the facts alleged and | | 15 | retaining rights Paramount could experience the upside. And | |
| 16 | determine whether or not there is sufficient scienter. First | | 16 | therefore could so plaintiffs. | |
| 17 | of all, as you know, I have already found that there was | | 17 | So what evidence do plaintiffs have? Paramount has | |
| 18 | truthful disclosure. Therefore there was by definition, there | | 18 | disclosed a lot of information which I referred to which | |
| 19 | has been a finding by me of no intent to mislead. But in any | | 19 | undercuts scienter. Disclosing information, as I've said in PX | |
| 20 | event, even if I were to assume that there were facts | | 20 | 532, PX 202, it disclosed in fact that Paramount was going to | |
| 21 | indicating some material misstatement or omission, which I have | | 21 | retain more foreign rights. It disclosed the expected | |
| 22 | not found, I would still find on its own independently of those | | 22 | co-financings in PX 252, DX 49, DX 202, DX 116, PX 389. So | |
| 23 | things that there was no scienter. | | 23 | there was disclosure of what was and was not happening and the | |
| 24 | First of all, I still don't understand who precisely | | 24 | absence of foreign presales was there if anyone chose to open | |
| 25 | is supposed to have intended to defraud the plaintiffs. It | | 25 | their eyes to see it. | |

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| 1 | The main evidence relates to statements that Paramount | | 1 | Capital at 343 F.3d at 189. It's the Castellano case at 257 | |
| 2 | was not intending or did intend to fundamentally change its | | 2 | F.3d at 179. And to make this determination Courts consider | |
| 3 | business strategy. But this is, as I've said before, been | | 3 | the entire context of the transaction, including factors such | |
| 4 | shown to be false. There was no evidence that anyone at | | 4 | as complexity, magnitude, the sophistication of the parties and | |
| 5 | Paramount believed that by not engaging in foreign presales | | 5 | the content of any agreements between them as well as whether | |
| 6 | they were engaging -- that was a fundamental change in business | | 6 | or not reliance was reasonable and that's the Emergent case at | |
| 7 | strategy. Let me state that again. There's no indication that | | 7 | 343 F.3d at 195. And I've considered these factors. | |
| 8 | whether or not for 20 films or 25 films foreign presales and | | 8 | I find that there was no actual reliance and no | |
| 9 | agreements were entered into was itself a fundamental change in | | 9 | reasonable reliance. There's no evidence that any plaintiff | |
| 10 | Paramount Pictures' business strategy. | | 10 | had any actual reliance on a particular level of foreign | |
| 11 | Plaintiffs point to the McGrath memo, the e-mail | | 11 | presales or type of, particular type of risk mitigation | |
| 12 | regarding no fundamental change which occurred after the PX 330 | | 12 | technique or a particular type of co-financing. But in any | |
| 13 | which was the Wall Street Journal article but that's not been | | 13 | event reliance was not reasonable. These were sophisticated | |
| 14 | shown to be false. It is certainly insufficient standing alone | | 14 | investors who knew how to evaluate risky deals and knew how to | |
| 15 | to establish an intent to defraud. There are disclaimers | | 15 | protect themselves when they wanted to do so. | |
| 16 | language and the no-assurances language in the PPM, it's all | | 16 | Now, the law is clear, I think quite clear that a | |
| 17 | over the place, all of the disclaimers in the Monte Carlo, | | 17 | specific disclaimer may certainly put a plaintiff on notice of | |
| 18 | everything else that we've talked about. That one statement by | | 18 | the unreasonableness of his reliance on a particular | |
| 19 | McGrath that is so vague and general cannot overcome all of | | 19 | representation, and that's the Harsco case, 91 F.3d 337 at 342. | |
| 20 | that. | | 20 | There's a long discussion there which talks about, quote, "An | |
| 21 | Plaintiffs have also failed to show through | | 21 | investor may not justifiably rely on a misrepresentation if | |
| 22 | circumstantial evidence that anyone at Paramount had the intent | | 22 | through minimal diligence the investor should have discovered | |
| 23 | to deceive. Hoffman testified he wasn't aware of any attempt | | 23 | the truth." | |
| 24 | to mislead and did not believe he himself had been misled. He | | 24 | There's also the Brown v. E.F. Hutton Group case, 991 | |
| 25 | testified that Paramount in fact appeared to be fully | | 25 | F.2d 1020 at 1022, which references that plaintiff failed to | |
| EAUFALL7 | Decision | Page 1643 | EAUFALL7 | Decision | Page 1645 |
| 1 | forthcoming and as of today he does not think he's been misled. | | 1 | establish justifiable reliance in light of warnings and | |
| 2 | And the evidence is that Paramount according to Hoffman did | | 2 | disclosures in the prospectus. There's the Danann Realty case, | |
| 3 | attempt to provide truthful information. | | 3 | 157 New England 2d 597, which is a New York Court of Appeals | |
| 4 | He knows about the McGrath memo. Hoffman for Merrill | | 4 | case, 1959 and there are other cases which stand for the same | |
| 5 | Lynch also testified credibly that he used other sources to | | 5 | proposition. | |
| 6 | confirm the accuracy of information contained in the PPM and | | 6 | So in fact you can disclaim your way out of fraud and | |
| 7 | that therefore he had an external source for at least some of | | 7 | there is no fraud here so that's not the issue. But you can | |
| 8 | it. And no one at Paramount asked Merrill Lynch not to provide | | 8 | disclaim your way out of misrepresentation based upon all of | |
| 9 | accurate information. There's no evidence from Burnaman, from | | 9 | the facts and the circumstances in a case, based upon the | |
| 10 | Springer, from Flynn or from Hohmann that anyone at Paramount | | 10 | sophistication of the investor, based upon what work that | |
| 11 | had the requisite intent. There's no person who's been shown | | 11 | investor could have done to understand the misrepresentation. | |
| 12 | to have made a misrepresentation or omitted something with | | 12 | Here the work that they needed to have done they never began to | |
| 13 | intent to defraud. | | 13 | do. They didn't model foreign presales. They didn't dig down | |
| 14 | Now, a word on the Affiliated Ute presumption. As a | | 14 | into foreign presales. They relied upon Maslansky who backed | |
| 15 | matter of law I find it does not apply. As a matter of fact I | | 15 | it out based upon speculation. The information that they had | |
| 16 | find it does not apply. So we're going to go into reliance and | | 16 | related to co-financings demonstrated running behind at | |
| 17 | I do not find that the Affiliated Ute presumption is applicable | | 17 | historical levels. If they wanted to dig down they could have. | |
| 18 | as a matter of fact or law. However, there's no basis for | | 18 | They didn't. | |
| 19 | reliance under any circumstances to establish a violation of | | 19 | Now, disclaimers and disclosures make any reliance on | |
| 20 | 10b-5. | | 20 | the foreign presales and other particular types of risk | |
| 21 | If we would go on to the next element, which is | | 21 | mitigation strategies unreasonable. I have reviewed all the | |
| 22 | reliance, a plaintiff must prove by a preponderance of the | | 22 | disclaimers and disclosures and I'm not going to do it again | |
| 23 | evidence transaction causation which is also usually known as | | 23 | now, but as we know Springer said he would use similar language | |
| 24 | reliance. That's the Dura case, it's 544 U.S. at 346. It's | | 24 | in his PPM and rely upon it to insulate him from risk. It's | |
| 25 | the Lentell case at 396 F.3d at 172. It's also Emergent | | 25 | reasonable for one to do that. It's reasonable for a company | |

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| 1 | to rely upon that. | | 1 | Munich Re saw and read the PPM. They had no direct | |
| 2 | In addition to disclaimers here, however, there was | | 2 | communications. They relied on Maslansky. Munich Re also said | |
| 3 | affirmative information given to the plaintiffs that made any | | 3 | they had not received assurances. Hohmann separately did not | |
| 4 | reliance on their belief that there was going to be a | | 4 | have any direct conversations with Paramount. The person who | |
| 5 | particular type of co-financing unreasonable, and that includes | | 5 | may have, Hanf, did not testify and there were no deposition | |
| 6 | things such as that UIP, generally distributes the film, that | | 6 | designations but there was her memo which appears to indicate | |
| 7 | Paramount retains all rights and makes all decisions related to | | 7 | no actual reliance. | |
| 8 | distribution. So fundamentally it was unreasonable for | | 8 | PX 655, Munich Re's business recommendation, does not | |
| 9 | plaintiffs to have relied given all of this evidence. But the | | 9 | mention foreign presales. Munich Re also received the | |
| 10 | evidence is also that they didn't actually rely, that this is | | 10 | additional slate information in DX 252 and DX 162 undercutting | |
| 11 | in the Court's view classic fraud by hindsight and I'll walk | | 11 | actual reliance. | |
| 12 | through briefly some of that evidence. | | 12 | Marathon's Springer testified that Marathon's business | |
| 13 | That in advance of the investment the evidence is that | | 13 | was in the high yield or riskier investments area and that he | |
| 14 | the plaintiffs as we know never broke out foreign presales from | | 14 | knew that there was no assurance of the same co-financing level | |
| 15 | other numbers. There's no evidence that achieving the | | 15 | or a particular risk mitigation technique. That undercuts | |
| 16 | historical level of foreign presales in particular was | | 16 | reliance. He did not speak with anyone directly at Paramount | |
| 17 | determinative of whether any of them would invest or not. I'm | | 17 | regarding the HDS and had no basis to rely upon the accuracy of | |
| 18 | sure they wish they hadn't invested for all kinds of reasons, | | 18 | the data. Flynn for Allianz also recognized the possibility of | |
| 19 | but nobody was ever asked -- I'll continue. | | 19 | a loss and did not model foreign presales. Also the investors | |
| 20 | Indeed, the documents introduced at trial demonstrate | | 20 | all saw the caveats in the subscription agreement which | |
| 21 | if plaintiffs relied on a particular level of co-financing or | | 21 | undercuts any kind of reliance. And it was unreasonable to | |
| 22 | foreign presales such reliance was unreasonable because the | | 22 | rely upon Moody's for any assurance that Paramount would | |
| 23 | documents established that plaintiffs were shown information in | | 23 | conduct its business in any particular way. That would be | |
| 24 | DX 5, DX 49, PX 613 about where foreign presales were run. | | 24 | unreasonable. | |
| 25 | Now, let's walk through some of the testimony. | | 25 | It was unreasonable to rely on the HDS as predicting | |
| EAUFALL7 | Decision | Page 1647 | EAUFALL7 | Decision | Page 1649 |
| 1 | Alliance Flynn said he never received any guarantees. That | | 1 | future results or future business practices, particularly in | |
| 2 | undercuts his actual reliance. He never asked for information | | 2 | light of the disclaimers. And the plaintiffs were unreasonable | |
| 3 | that wasn't actually provided. That undercuts reliance. He | | 3 | in not obtaining reps. It was unreasonable to ignore the | |
| 4 | said co-financing was important, but he did not say what | | 4 | disclaimers on PX 898, the Monte Carlo. It was unreasonable to | |
| 5 | particular level of foreign presales was important or that he | | 5 | ignore PX 655 which acknowledged a 25 percent possibility of | |
| 6 | had sought that information. Nor was he asked, frankly, that | | 6 | loss. And it was unreasonable to assume a different pattern of | |
| 7 | he ever had any decision-making authority. | | 7 | co-financing than that evident in PX 162 and PX 563 and it was | |
| 8 | In the designations of Seery who was I believe the | | 8 | unreasonable to ignore that UIP which had significant costs | |
| 9 | Allianz decision maker, he similarly testified that he wasn't | | 9 | associated with it and was also referenced as the entity which | |
| 10 | given any guarantees. Neither Flynn nor Seery was asked and | | 10 | generally handled distribution outside the U.S. would suddenly | |
| 11 | didn't testify that a particular type of risk mitigation | | 11 | disappear. | |
| 12 | strategy was something they had particularly relied upon in | | 12 | Now let's turn to loss causation. A plaintiff in a | |
| 13 | entering into the transaction. | | 13 | 10b-5 action has the burden of proving loss causation which is | |
| 14 | Newstar and the other plaintiff witnesses testified | | 14 | the causal link between the alleged misconduct and the economic | |
| 15 | that Paramount's business strategy was important to Newstar in | | 15 | harm ultimately suffered by the plaintiff and that's the | |
| 16 | evaluating and deciding whether to proceed but of course this | | 16 | Lentell case, 396 F.3d at 172. Plaintiff has to prove that the | |
| 17 | only states the obvious. Risk mitigation, one would expect | | 17 | act or omission of the defendant caused the loss and that's in | |
| 18 | every business to do some of that, but particular forms of risk | | 18 | the statute. A misstatement or omission is the proximate cause | |
| 19 | mitigation committed to is something very different. Newstar's | | 19 | of an investment loss if the risk that caused the loss was | |
| 20 | Burnaman testified he was not expecting a particular level of | | 20 | within the zone of risk concealed by the misrepresentation or | |
| 21 | foreign presales. That undercuts reliance. No one spoke to | | 21 | omission alleged by a disappointed investor. That's the | |
| 22 | Newstar about co-financing or levels of co-financing. | | 22 | Lentell case again. | |
| 23 | Newstar's Burnaman also could not recall anybody at Merrill | | 23 | Now, to establish causation a plaintiff has to show | |
| 24 | Lynch told him that Paramount had committed to any particular | | 24 | both that their alleged loss was foreseeable and that it was | |
| 25 | level of co-financing. | | 25 | caused by materialization of the concealed risk. That's the | |

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| 1 | Lentell case, the Emergent Capital case and there has to be | | 1 | reasons for a film's success or failure, box office success | |
| 2 | that specific causal connection. | | 2 | being a primary driver of success everywhere, certainly in | |
| 3 | In the Dura case the Supreme Court talks about | | 3 | terms of a foreign jurisdiction. | |
| 4 | proximate cause, but the proximate cause linkage for causation | | 4 | There has to be evidence that the guarantee plus | |
| 5 | is set forth in numerous cases in the securities fraud and | | 5 | overage that was embedded into the historical numbers could | |
| 6 | fraud area generally. Plaintiffs here have failed to show loss | | 6 | have been obtained. If it's a box office flop you're not going | |
| 7 | causation by a preponderance of the evidence. It does require | | 7 | to get the overage. You might get the guarantee, but there's | |
| 8 | a causal link. That link can't be assumed. It can't be merely | | 8 | no evidence you'll ever get the overage. As I understand the | |
| 9 | possible. There can't merely be a connection. It has to be | | 9 | numbers based upon the evidence at trial, the information on | |
| 10 | causal. In this case, it means that plaintiff's loss had to | | 10 | what was obtained in the past was the information, it was what | |
| 11 | have been caused and there can be more than one contributing | | 11 | was received. That contained the revenues received for those | |
| 12 | factor for proximate cause, but you've got to do something to | | 12 | co-financings. That over time would, I would assume on a | |
| 13 | show that it's the proximate cause, not that it's simply | | 13 | trailing level, embody and incorporate overage. If you've got | |
| 14 | connected to. So there would have to be something, for | | 14 | a flop you're not going to have that overage. Therefore, it's | |
| 15 | instance, that the foreign territorial sales would have to | | 15 | not just a guarantee number or if it is that guarantee number I | |
| 16 | exceed the foreign self distribution receipts, but there's no | | 16 | don't have that information to draw that out. So I don't have | |
| 17 | evidence of that. They would have to show that there is | | 17 | specific information and I don't find there's any loss | |
| 18 | something which differentiates what happened with foreign | | 18 | causation. | |
| 19 | presales in terms of the numbers from the various numbers run | | 19 | In terms of common law fraud, the Engle case in New | |
| 20 | for the other revenue items. For instance, the Monte Carlo. | | 20 | York which is the 983 NY Supp 2d 630, New York App. Div. 2014 | |
| 21 | It ran 10,000 different permutations. I won't go into it, but | | 21 | sets out the elements under New York law the elements of fraud | |
| 22 | lots of things one could have done with that Monte Carlo that | | 22 | are narrowly defined, requiring proof by clear and convincing | |
| 23 | weren't done. | | 23 | evidence. Even if it was by a preponderance, this plaintiff's | |
| 24 | So the question is whether the failure to enter into | | 24 | claims still would not meet it under any standard. The Gaidon | |
| 25 | additional foreign presales caused the plaintiffs' loss. Now, | | 25 | case, at 725 NE 2d 598, that's 607, stands for that. | |
| EAUFALL7 | Decision | Page 1651 | EAUFALL7 | Decision | Page 1653 |
| 1 | that's different from saying if you add in a foreign presale | | 1 | Omissions do not exist really in New York State fraud | |
| 2 | number does it goose up your number and therefore if you goose | | 2 | claims, but even if they did the Court's finding would be the | |
| 3 | it up high enough to the plaintiffs recover. That's not the | | 3 | same as I've already stated for securities fraud. That's the | |
| 4 | same thing. It's proximate loss causation, not connection. | | 4 | Mandarin Trading case, 944 NE 2d 1104 at 1108, that's New York | |
| 5 | Otherwise any revenue diminution or addition could in one way | | 5 | 2011. And also in New York, you're also to look at | |
| 6 | or another be found to be proximate and that's not what the law | | 6 | sophisticated businessmen and determine whether or not they | |
| 7 | provides for proximate cause. | | 7 | could have been defrauded in the manner suggested and it's just | |
| 8 | In addition, there's evidence in the record that based | | 8 | not credible to the Court that they could have been. Not these | |
| 9 | on the Melrose slate and the HDS that the average production | | 9 | guys. Not the guys who testified in front of me. They were | |
| 10 | costs of the Melrose slate was higher and that receipts were | | 10 | very sophisticated. I would say they knew what they were | |
| 11 | lower. That undercuts a finding of proximate cause. That's DX | | 11 | doing. | |
| 12 | 6, PX 899. | | 12 | Disclaimers also under New York law where a plaintiff | |
| 13 | There's no reference to larger macro economic factors. | | 13 | has announced and stipulated that it's not relying on any | |
| 14 | Indeed, each of the territories would have to be evaluated for | | 14 | representation which is contained in the disclaimer, in the | |
| 15 | the macro economic factors. You can't just assume it, you | | 15 | very manner which now claims to be defrauded, the specific | |
| 16 | can't assume it as Fier does, as if it could have occurred, | | 16 | disclaimer destroys plaintiffs claims. You can disclaim fraud. | |
| 17 | because there's no evidence in the record that there were any | | 17 | Let's put it differently. You can rely, you can agree to a | |
| 18 | particular deals that were in a particular territory that were | | 18 | disclaimer which precludes a later claim of fraud. That's the | |
| 19 | there as low-hanging fruit for the taking. So it's just | | 19 | Danann case, 157 NE 2d 259-7602. | |
| 20 | speculation that those deals with certain revenue numbers could | | 20 | So for all of the reasons set forth above and under | |
| 21 | have occurred and that those revenue numbers would have been | | 21 | the New York law, the Court does find the plaintiffs have not | |
| 22 | good enough to have overcome whatever low level of self foreign | | 22 | proven fraud under New York law by either a preponderance of | |
| 23 | distribution revenues were otherwise obtained. That would have | | 23 | the evidence or clear and convincing evidence. | |
| 24 | had to occur and it didn't. | | 24 | In terms of unjust enrichment, the elements of that | |
| 25 | There's testimony in the record that there can be many | | 25 | cause of action are set forth in the Mandarin case, 944 NE 2d | |

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1 at 1110, which also it's worth taking a look at the Citibank
 2 case at 12 AD 3rd 480 at 481. The elements are set forth
 3 there. You've got to show that the party was enriched at
 4 another party's expense. I don't find here based upon all that
 5 I've said that the other party here was enriched at their
 6 expense. Expense incorporates not only a concept of literal
 7 dollar flows of who were the winners and who were the losers,
 8 but whether the winner and the loser, there's an element there
 9 that goes beyond just win/loss and it goes into equity and
 10 whether an equity in good conscience the other party should be
 11 permitted to recover and I don't find that the equities here
 12 are in plaintiff's favor.

13 So for all of those reasons, the defendant's motion is
 14 granted. Judgment is entered. The Court will put out a
 15 one-paragraph order that will enter judgment for Counts One
 16 through Three of plaintiff's complaint. That will occur
 17 tomorrow for purposes of any subsequent actions in the case.
 18 Otherwise, I believe it's fully resolved and terminated.

19 MR. ARFFA: Thank you very much, Judge.

20 THE COURT: Thank you. We're adjourned.

21 (Adjourned)
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1 PLAINTIFF EXHIBITS
 2 Exhibit No. Received
 3 198, 221 and 2551442
 4 318 and 8771442
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